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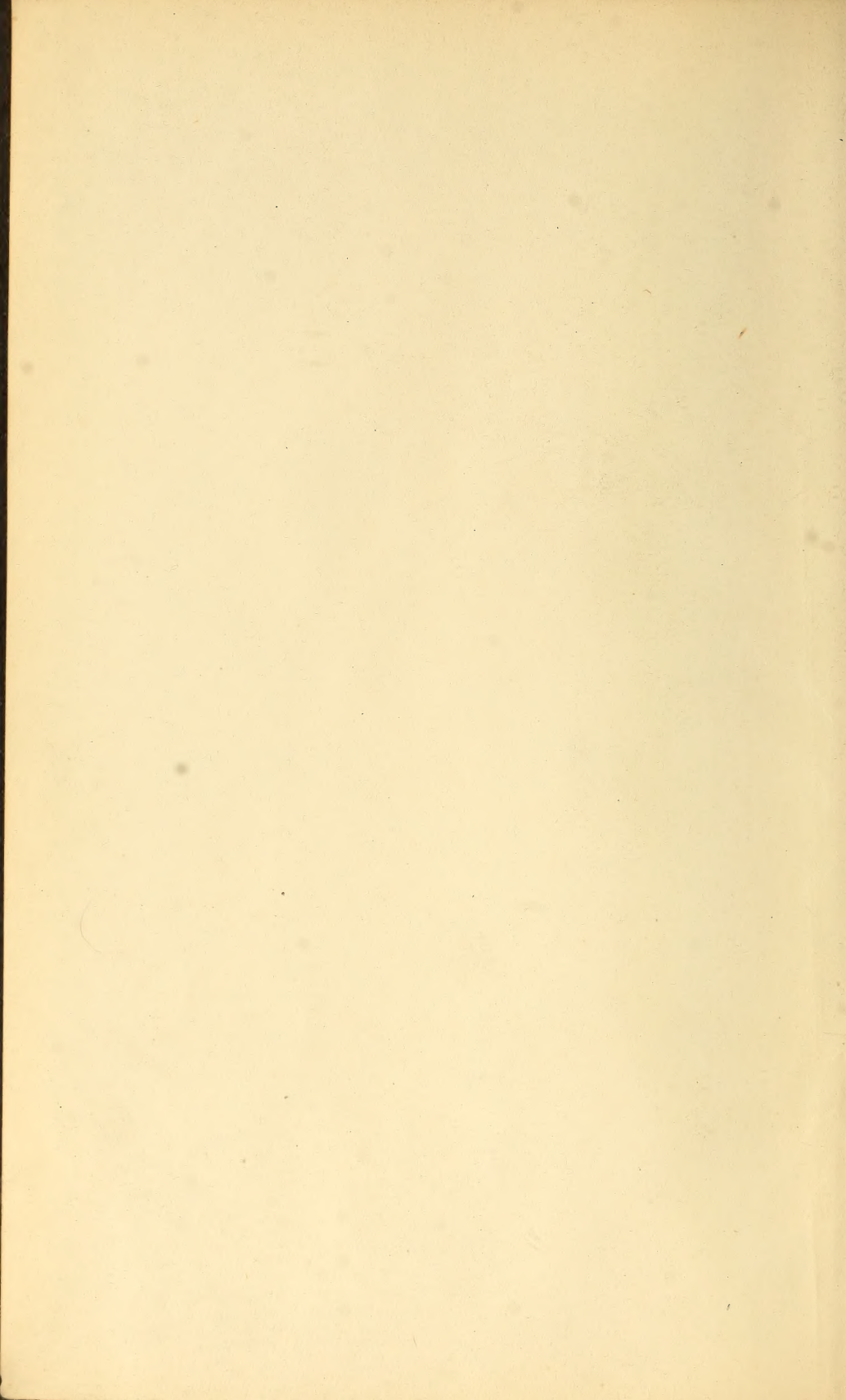
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A HAND-BOOK  
OF  
CORPORATION LAW

*As Applied to*  
*Private Business Corporations*

BY  
RICHARD SELDEN HARVEY  
Of The New York Bar

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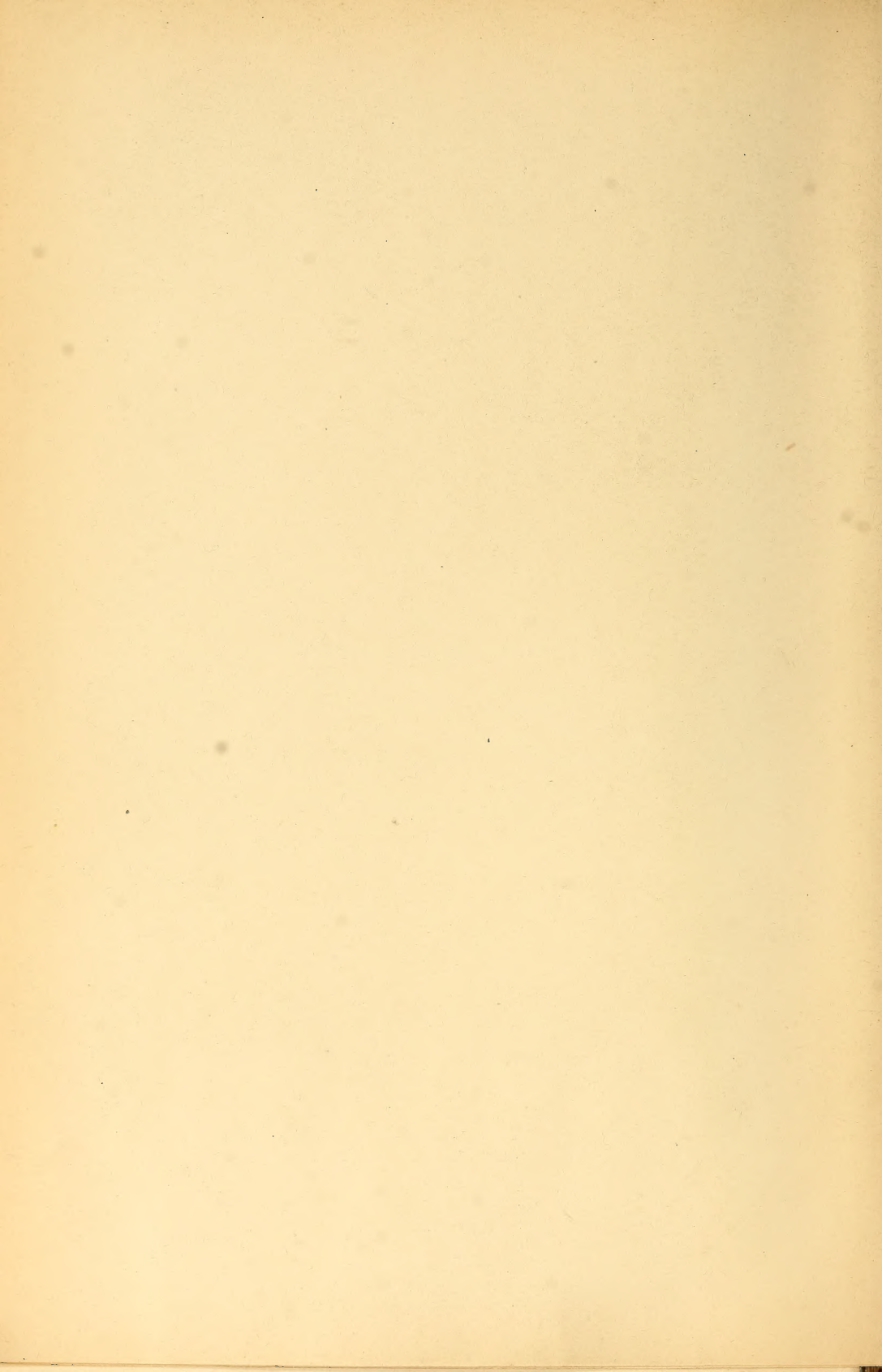
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TO  
ARTHUR P. HEINZE,  
CLASSMATE AND FRIEND,  
THIS WORK IS RESPECTFULLY DEDICATED  
BY THE AUTHOR.





There is a potency in numbers when combined, which  
the law cannot overlook, when injury is the consequence.

CHIEF JUSTICE AGNEW,  
*late of the Pennsylvania Supreme Court.*

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## PREFACE.

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The subject of the following pages is one which, it is believed, must appeal to the modern lawyer.

The tide of transition from individual and partnership effort to incorporated forms has its source in good and sufficient reasons.

This process of evolution being a beneficial one, will continue its course, at least in the realm of larger concerns; and it requires of the progressive and ambitious practitioner an effort to not only keep abreast, but to be in advance of the movement.

At the present day lawyers have not the time, even though they have the disposition, to deal with abstract questions of law. They need to know what has stood the test of challenge and dispute; namely, the utterances of Lords Hardwicke and Eldon, and their American counterparts, Marshall, Kent, Selden, Black, Davis, Waite and others of recognized standing.

Herbert Spencer, in his autobiography, says: "I could have filled a bookcase with masterpieces which I have not read." There are in every law-library of fair magnitude thousands of practically unused decisions which are the ripened products of experienced legal minds. They are gems of legal thought, not only pleasing to read, but capable of enlightening both bench and bar if time were available for their perusal. In the prevailing method of legal examination, the

examiner usually goes to the digests, or to the encyclopedias of law, and from them to the reports; but it is to be regretted that in many instances he stops at the digests, and filling his brief with "cases," leaves it to the judge to go to the reports,—often to discover irrelevancy or unprofitable reiteration and redundancy.

Those painstaking lawyers who go to the reports themselves in most instances review but a portion of the cases cited; in fact, the vast number of the references serves to repel and embarrass the briefing examiner, and often by the irony of fate the best authorities are passed by. Few go beyond the reports of their own and neighboring States, so that the greater part of that which is recorded is in effect lost and unknown. This is the more unfortunate because some of the smallest and even youngest of the States have possessed, and still produce, jurists who, judged by their work, are entitled to take rank with those who have conferred honor on the older and larger States.

This work will not have been written in vain if some cases have been rescued from undeserved neglect, and if attention has been called to quarters where similar treasures will reward future research.

It is perhaps only just to reader and author to say that there has been in the inception of this book a motive outside of and beyond the realm of pecuniary reward.

Coupled with the growth of corporations in number



and importance has appeared a system for the despoiling of the small investor,—a system so adroit and audacious, and oftentimes so successful, as to constitute one of the plagues of the business-world.

To combat and to destroy this up-to-date piracy will be the aim of every honorable practitioner. It is hoped and believed that ammunition for that warfare will be found in the following pages, to the end that the modern corporation may go forth fully equipped either for its ordinary course of employment, or for defense; as in the China seas the merchant-vessel carries ordnance sufficient, on occasion, to defend itself against the attacks of predatory rovers.

It is too often assumed that the fight is hopeless, and a faint-hearted resistance is offered to those schemes for self-aggrandizement,—cherished and promoted by covetous associates in the common venture.

This, however, is not good Anglo-Saxon doctrine, nor is such a sentiment to be found anywhere in the opinions of the jurists of Great Britain or America. Courage of the kind which prevailed upon the fields of Poitiers, Crécy and Waterloo is not extinct, and never will be; and when like pluck and resistance are carried into the fight against greedy combinations of corporate managers, the "thin red line" of opposing shareholders will gain the day.

While the practical question, viz., whether the property-interests at stake and the evidence at command warrant appealing to the courts, must be decided in accordance with the facts of each individual case, the

readiness of those tribunals to protect the weak from spoliation by the strong, is abundantly illustrated in the text.

In preparing this work, the author has gone with confidence to the great source of equity jurisprudence, and his search among the decisions of the Lords High Chancellors and their associates has not disappointed him in the quantity and the quality of the material there found ready to hand. "Without fear or favor,"—the enunciations of law therein set forth are lofty, strong and distinctly judicial in their tone, and will remain an inspiration for generations yet unborn.

It is to be regretted that in too many modern tribunals nice distinctions, saving clauses and particular cases have been permitted to befog the vision and to obscure, in whole or in part, the eternal rules which are, and must abide, the bright and God-given source of equity jurisprudence.

It behooves the student, accordingly, to get back to first principles and to study those ancient decisions which, like the Ten Tables of old, remain a repository of high ideals and sound law.

In the presence of these standard decisions and declarations by master-minds, the element of variance from true alignment can be at once detected, and the measure of confidence to be reposed in modern cases in American, English and Colonial courts can be correctly estimated and assigned.

The cases cited are in line, it is believed, with the catholic spirit with which the author has approached

the work at bar. Wherever the rules of equity prevail his search for useful precedents has extended. The ability of a given decision or text-book has been deemed sufficient ground for citing it, or for quoting from its pages, without regard to the size or importance of the State in which it was rendered or produced; merit alone has been the touch-stone.

In fact, there are throughout this book numerous instances supporting the statement hereinbefore made, viz: that there is a large amount of excellent material "locked up" in the least-cited reports.

Should these labors encourage a closer study of those cases worthy to be denominated "leading" and here for the first time joined in communal relations, it will be a source of great satisfaction to the author, independently of other rewards for the effort involved in this "search after wisdom."

The principle enunciated in the text regarding the right of the shareholder to an inspection of the books and records has been affirmed in recent decisions by the United States Supreme Court.

This confirmation of views, deliberately adopted after careful study of conflicting authorities, it is gratifying to record.

Among the text-books which have been invaluable are the following:

Spelling on Private Corporations.

Angel and Ames on Corporations.

Potter on Law of Corporations.



Beach on Private Corporations.

Kyd on Corporations.

Clark and Marshall on Corporations.

Cook—I, on Corporations ;

2, on Stock and Stockholders.

Morawetz on Private Corporations.

Thompson on Corporations.

Waterman on Corporations.

Brice's *Ultra Vires*.

The author desires to express his appreciation of the uniform courtesy of Mr. Alfred J. Hook, Librarian, and especially of the aid of Mr. Daniel E. Cumberly, Assistant Librarian of the Law Library in Brooklyn, who has corrected the citations and authorities, and prepared the table of cases, and to whose trained assistance he has been greatly obligated in the progress of his labors.

RICHARD SELDEN HARVEY.

New York,

April, 1906.

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# HAND-BOOK OF CORPORATION LAW.

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## CHAPTER I.

### The Private Business Corporation — Definition and Relation to Component Members.

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A much-discussed topic. — The basic distinction considered. — Limitations of this treatise. — Definitions from various authoritative sources. — A leading decision. — Other leading cases. — The civil law. — The corporation is a distinct entity. — Authorities generally. — Origin of business-corporation idea. — Substantial harmony of definitions. — Substance of definitions.

A much-discussed topic. — The definition of the private business corporation has been the subject of almost boundless discussion, not only by the text-writers, but by the courts.

In a general way, it may be said that a corporation is an association of persons who, with their successors, have been by the Sovereign or the People acting through its representative the legislature, formed into an artificial body constituting a legal entity, for the purpose

of carrying on some designated business or enterprise, with the power of acting as a unit and possessing the right to be treated to a certain extent as a natural person.

**The basic distinction considered.** — Perhaps the reader cannot be put in touch with the subject more readily than by the following article from the “American Law Review.” The learned writer says:

“In the recent work of Messrs. Lowell on Transfers of Stock, the legal idea of a corporation is thus expressed:—‘The corporation is something distinct from its members, its life is independent of theirs. Its will may at times be different from that of its members; and it may be bound by conduct which binds no one of its members as an individual; of course there is in reality no rights or duties but those of natural persons: but the rights and duties of natural persons who deal with a corporation arise from a mere fiction and their nature and extent are determined by that fiction. A person therefore who confounds a corporation with its stockholders, who say they are the corporation, or that it consists of its members, not only mistakes the legal view of the matter, but is in danger of falling into endless confusion and error. A corporation is distinct from its members in the same sense that a State is distinct from its citizens. The parallel indeed between a corporation and a State is very close.’ ”

Professor Pomeroy, in his review of Taylor on Corporations, is then quoted as follows:

"The author has here touched upon, although he has not fully developed, a fact which in our opinion must ere long be recognized and acted upon by the courts in dealing with the law of corporations.

"The common-law conception of the 'legal personality'—of the metaphysical entity constituting the corporation, entirely distinct from its individual members, arose at a time when corporations were all created by special charters generally granted by the Crown. When very few of them were 'stock' corporations: when they were mostly perpetual in existence; when absolutely no personal liability was imposed upon the individual corporators, but the legal *status* of the corporators was wholly swallowed up in the 'legal person' of the corporation, and when corporations were in reality, as a necessary result from this creation and legal position, monopolies.

"In the United States at the present day almost all corporations, whether business or otherwise, are formed under general laws. \* \* \*

"The English courts have never treated the 'Joint Stock Companies' with limited liability, formed under these special statutes, as being identical with common-law corporations, but have always carefully distinguished between them. In our opinion, the American courts must, in time, recognize and enforce the same distinction."

The editor of the review then continues:

"It ought, perhaps, to be added, that both views of the question are measurably correct. A corporation,

in most of its relations, acts as a unit, and it is, for the most part, convenient to view it as an unit and to regard it as a 'person in law'; but in many relations the proper idea of a corporation is not that of a person, but that of an aggregation of persons, or a kind of limited partnership. The effort of practical jurisprudence should be to regard it as an unit, or as a collection of persons, according to the relation in which it acts in a given instance. The shield will be either red or white, accordingly as it is viewed from the one side or the other."—*Am. Law Review*, Vol. XIX., p. 114, *et seq.*

**Limitations of this treatise.**—It is not the purpose nor within the scope of this work to enunciate the correct rule, as we conceive it to be, excepting in disputed points; it is rather to afford to the reader, whether professional or lay, the "Key-note" of the subject and the source from which he can obtain more light, if desired. With this end in view, we have drawn quite extensively upon the foregoing able review of the subject in hand.

**Definitions from various authoritative sources.**—The definition of Messrs. Clark and Marshall in their elaborate work is as follows:

"A corporation is a body or artificial person, consisting of one or more individuals and sometimes of individuals and other corporations, created by law, and invested by the law with certain legal capacities, as the capacity of succession, and the capacity to sue and be sued, to make contracts, to take, hold and convey



property, to commit torts and crimes and do other acts, however numerous its members may be, like a single individual."

2 Clark & Marshall on Private Corporations, sec.

I, p. 2.

Annexed to the foregoing is an extensive enumeration of the phases which a corporation may assume:

"A corporation, therefore, when it consists of more than one member, which is almost universally the case, may be regarded, according as the one view or the other may be necessary, either

"1. As a legal body or entity in which the existence of the natural persons who compose it is merged, or,

"2. As a collection or association of natural persons vested with the capacity of existing and acting as a body.

"1. As a body or legal entity, it is distinct from the members who compose it and as such has,

"a. The capacity of succession, which is the capacity to exist as the same body for any length of time, notwithstanding the death, withdrawal or change of members.

"b. The capacity to enter into contracts in its corporate name like an individual.

"c. The capacity to take, hold and convey property in its corporate name like an individual.

"d. The capacity to commit torts and crime with some exceptions like an individual.

"e. The capacity to sue and be sued in its corporate name like an individual.

"3. It is merely by a fiction of law that a corporation is thus a legal entity distinct from its members. In reality it is a collection or association of natural persons who are created into a body for the purposes above enumerated, and it will be treated as such both in equity and law, whenever the fiction is urged to an intent and purpose which is not within its reason and policy."

Clark and Marshall on Private Corporations, Vol. I., sec. 1, p. 2. See long line of sustaining cases; also note.

The definition given by Cook is: "An artificial person like the State. It is a distinct existence, an existence separate from its stockholders and directors."

Cook on Corporations, Vol. I., sec. 1, p. 2.

(Chicago, 1903, 5th Ed.), citing Chief Justice Marshall's opinion in the celebrated Dartmouth College Case, 4th Wharton 636, and the language of Lord Coke:

"An artificial being, invisible, intangible and existing only in contemplation of law."

The reference to the words of the learned and distinguished Lord Coke calls for more than passing attention by the reader.

The following extracts from Mr. Brice's excellent work are given at considerable length, because they illuminate the subject:

“ ‘A corporation is a person which exists in contemplation of law only and not physically. It is a collection of many individuals united in one body under a special denomination, having perpetual succession, under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it at the time of its existence.’ This is the description set forth by Kyd (1 Kyd 13) and it is a fairly accurate description of the general nature of a corporation aggregate, but sufficient stress is not laid upon that which is its real characteristic in the eye of the law, viz., its existence separate and distinct from the individual or individuals composing it.”

Green's Brice's *Ultra Vires* (Stevens & Haynes' Ed., London, 1893), Part I., Chap. 1, sec. 1.

“It is a fiction, a shade, a nonentity, but a reality for legal purposes. A corporation is only *in abstracto*—it is ‘invisible, immortal and rests only in the intentment and consideration of law.’ This is the description given by Coke in the case of Suttons Hospital (10 Coke's Rep., 1, 23), and though exception has sometimes been taken to it, and more especially that a corporation is immortal, probably no better definition at once brief and accurate, can be given. The essential

part of the notion involved in the term corporation is its abstraction, the intangibility of its existence, its being composed of a physical being, or beings, through which it manifests its capacities and powers, but from which it is totally distinct. This is the one important fact. The members of a corporation aggregate (note 'and the individual who is constituted a sole corporate') may form their connection with such, have rights and privileges, and be under obligations and duties over and above those affecting them in their private capacity, but they get them by reflection, as it were, from the corporation. They individually are not the corporation—cannot exercise the corporate powers, enforce the corporate rights, or be responsible for the corporate acts; while even at common law they can mutually sue or be sued by the corporation or each other."

Ibid, page 2.

Name, and common seal, and perpetual identity are essentials. Corporations enjoy, to some extent, attributes of immortality; but to say "They never die" is incorrect, they do terminate.

In the United States perpetual corporations are the exception.

Dillon on Municipal Corporations, 91, says:

"Continuous legal identity and perpetual or indefinite succession under the corporate name exist notwithstanding successive changes by death or otherwise in the corporators or members of the corporation."



"It conveys perhaps as tangible an idea as can be given by a brief definition, to say that a corporation is a legal person with a special name, and composed of such members, and endowed with such powers, and such only as the law prescribes. This simply denotes that, notwithstanding the lapse of time or alteration in the constitution of a corporation or the renewal, many times repeated, of all its members, or its reconstruction on a new basis and even with different objects, the corporation itself remains the same—it does not import that it must or will continue forever."

The case of *Hospital vs. Sutton*, Cooke's Reports (Fraser), Vol. V. pp. 253-307 inclusive, remains one of the leading cases on the subject of English corporations, and like English corporation law generally, is much copied in this country.

In Viner's *Abridgment of Law and Equity*, Second Ed., Vol. 6, pp. 258-9 (1792), it is said:

"1. A corporation is a body politic consisting of material bodies, which joined together must have a name to do things that concern their corporations, or otherwise it is no corporation.

"2. All the natural persons of the corporation are not the corporation, but are persons of which the corporation consists, but not wholly, for the name is a part, without which the corporation cannot be; also, the King may give power to a common person to name the persons and the name of the corporation, and when

he hath done so, this corporation is not said to be made by the common person, but by the King."

Ibid.

In Bacon's Abridgment, Vol. II., 437 (Philadelphia, 1860), the definition is as follows, viz.:

"A corporation aggregate is an artificial body of men, composed of diverse constituent members *ad instar corporis humani*, the ligaments of which body politic or artificial body are the franchises and liberties thereof, which bind and unite all its members together, and in which the whole frame and essence of the corporation consists."

Mr. Justice Potter, in a note to the above, says:

"A corporation is a body under an artificial form created by law, composed of individuals united in one body, under a common name or special denomination, the members of which succeed each other, so that the body continues the same notwithstanding the change of the individuals who compose it, and for certain purposes considered as a natural person (2 Kent's Com., 215), vested with a capacity of taking and granting property, of suing and being sued, of enjoying privileges and immunities and of enjoying a variety of rights of other individuals or persons more or less extensive, according to the design of its institution, or of the powers conferred upon it either at the time of its creation or at any subsequent period of its existence."

(Citing, 1 Kyd on Corporations, 13.)

"It is said to be an intelligent being, different and distinct from all persons who compose it. It has individuality, the estate or rights of the corporation belong completely to the body and not to the individuals who compose it, nor can any one of them dispose of such estate or any part of it. In this respect the right to the property is different from the right held in common. What is due to the corporation is not due to any of the individuals who compose it, and debts due by such corporations are not due by the individual members.

"It is a legal person (sometimes said to be a political person, or body politic). In its legal existence it is capable, like a natural person, of enjoying a variety of franchises. Like franchises in one respect, it is expressive of great political rights. It is a special privilege, which does not belong to citizens generally of common rights. (2 Blackstone's Com's 37.) And in this country a corporation can only exist by virtue of the law of the state."

Potter on Law of Corporations, Vol. I., p. 3, sec. 3, *et seq.*; citing:

Bank of Augusta vs. Earle, 13 Peters, 519.

Mr. Spelling, in his very clear, able and satisfactory work on corporations, says:

"A corporation has been defined by writers and judges in varied phraseology and degrees of accuracy. All agree that it is purely a creation of law, with cer-

tain rights in common with individuals and others that are distinctive, all of which must be held and exercised for the object for which it is created. While it is manifest that a corporation cannot, for any practical purpose, exist without members, yet, in strict legal contemplation, as has often been adjudicated and explained, the legal entity is something distinct and separate from those who employ it as an agency to accomplish their objects, whether these be public or private, and it is equally difficult to discover any reason for incumbering the definition with a consideration of the corporation's term of existence.

"There is nothing definitive in the idea of immortality, and besides, under modern laws, the term of corporate existence is usually limited, like a lease of real estate, to a number of years. Even when such is not the case, the length of a corporation's life always depends upon the will or disposition of its members to keep it alive.

"It is also liable, like natural persons, to accident, and may at any time, as we shall see hereafter, have its term of existence cut short at the hands of the state, on account of the malfeasance or nonfeasance of its management.

"A full and complete definition of a corporation can only be given by telling what are its rights, powers, duties and relations, and the legal and equitable principles which control it in all its parts and functions, and how they operate."



Spelling on Private Corporations, Vol. I., sec. 1, p. 3,  
*et seq.* (New York, 1892.)

Angel and Ames on Corporations, sec. 1, have this definition to offer :

“A body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the individuals who compose it, and is, for certain purposes, considered as a natural person.”

The Civil Code of Louisiana defines a corporation to be :

“An intellectual body, created by law, composed of individuals, united under a common name, the members of which succeed each other, so that the body continues always the same, notwithstanding the change of the individuals who compose it, and which for certain purposes is considered as a natural person.”

Merrick's Revised Civil Code of Louisiana, Vol. I., p. 102, art. 427 (old article 418).

In Morawetz on Corporations, a work in much and deserved favor, the definition cites the words of Chief Justice Marshall in the Dartmouth College Case, and that standard author, Kyd, adding :

“The definition given by Kyd is not inconsistent with that of Chief Justice Marshall, when correctly understood. Kyd described a corporation as a collec-

tion of many individuals authorized to act as if they were one person. Chief Justice Marshall, on the other hand, treats the collection of individuals constituting the corporation as a united body, and personifies it; while he considers the individuals who compose this body merely as component parts. It is apparent that both definitions describe the same thing regarded from different points of view. While a corporation may from one point of view be considered as an entity, without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or a thing distinct from its constituent parts. The word 'Corporation' is but a collective name of the corporators or members who compose an incorporated association, and when it is said that a corporation is itself a person, or being, or creature, this must be understood in a figurative sense only."

"The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought."

Morawetz on Private Corporations, Vol. I., p. 1, sec. 1.

**A leading decision.**—Probably the most important New York decision touching the question of Corporation definition is *Warner vs. Beers*, 23d Wendell (N. Y.), 103 (including *Bolander vs. Stevens*). These cases were tried in the Court of Errors, then the Court of last resort in the State of New York, in 1840, Chancellor Walworth presiding. In the cases were the most distinguished counsel of that day, including William

Curtis Noyes and Messrs. Sandford, Fort, Kent and Ogden.

The opinions were by the Chancellor and Senators Root and Verplank.

The Court, in its decision, referred to the opinion of Chief Justice Nelson, and Bronson and Cowen, J. J., in that other celebrated case, *Thomas vs. Dakin*, reported in 22 Wendell, 9.

At page 121 the learned Chancellor said :

“In ascertaining the nature and properties of that indefinable, soulless body referred to in the Constitution as a body politic or corporate, we shall certainly be misled, if we attempt to confine it to such artificial bodies as by the common law of England were created by Royal Charters, by virtue of the King’s prerogative alone. Though such corporations which were thus created have existed in such various forms, and with so many combinations of powers, privileges and immunities that it is almost impossible to say what is or what is not a corporation by the common law by merely referring to the existence of any particular power, right, or privilege, as appertaining to an association or commonalty of individuals. And from time immemorial, as at the present day, this privilege of being a corporation, or artificial body of individuals, with the power of holding their property, rights and immunities in common, as a legally organized body, and of transmitting the same in such body by an artificial succession, different from the natural successions

of the property of individuals, has been considered a franchise which could not be lawfully assumed by any associated body without a special authority for that purpose from the Government or Sovereign power.

“Professor Erskine, the learned Scotch Civilian, says: ‘A corporation is composed of any number of persons, united or created into a body politic, to endure in continual succession, with certain rights and capacities of purchasing and suing, etc., as appears most suitable to that special community, and most necessary for answering the purpose intended by it.’ (Citing, 1st Erskine, Justice, by Macallen, 190.)”

“Again, trading companies, whose duration is generally limited by the grant to a certain number of years, are likewise proper corporations, because they, too, endure in continual succession while they subsist.

“These definitions of a corporation, so far as such an invisible, artificial, intangible being, but which at the same time assumes so many various forms, is capable of being defined by any general descriptive terms—are in substantial accordance with the definition given by Chief Justice Marshall, in the Dartmouth College Case, and in the definition given by Kyd and by Angel and Ames; and also in the Civil Code of Louisiana.”  
(See each of the above authorities cited herein, *supra*.)

**Other leading cases.**—The leading case of *Thomas vs. Dakin*, cited in the above, was decided in the same court a year or so before. It illuminated the law regarding corporations as the same obtained in



New York State, and for that matter in almost all the United States, as well as in Great Britain and the British Colonies.

Other citations are as follows:

The President and College of Physicians, London, vs.

Salmon, 2d Salkeld, 237-451; 1 Lord Raym, 680.

Same Plaintiffs vs. Talbois, 1 Lord Raym, 153.

2 Jacoby's Law Dictionary, p. 94.

Denton vs. Jackson, 2d Johnson's Chancery Reports,  
(N. Y.) 320-324.

While the last-named case is not particularly relevant, it is interesting, and the subject-matter is further treated of in Central Law Journal, Vol. II., p. 242.

The United States Supreme Court has adopted substantially the same definition.

Marshall vs. Baltimore & Ohio R. R. Co., 57 U. S.  
(16 Howard), p. 314.

In this decision, which was, *pro tanto*, the unanimous opinion of the Court, that distinguished jurist, Mr. Justice Grier, said:

"A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible.

"This is, no doubt, metaphysically true in a certain sense. The inference also, that such an 'artificial entity' 'cannot be a citizen,' is a logical conclusion from the premises, which cannot be denied.

"But a citizen who has made a contract and has a 'controversy' with a corporation, may say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons, that his writ

has not been served on an imaginary entity, but on men and citizens.

"The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation where the faculty of contracting, suing and being sued is in a fictitious or collective name.

"But these important faculties, conferred on them by State legislation for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deal subtly with words and names, without regard to the things or persons they are used to represent."

In support of the doctrine that persons artificial are to be treated as persons natural,—see unanimous opinion of the California Supreme Court, in *Douglass vs. Pacific Mail S. S. Co.*, 4th California 304 (306), wherein Ch. J. Murray says:

"The word 'person' in its legal signification is a generic term, and was intended to include artificial as well as natural persons."

The foregoing had to do with the construction of a California statute.

In Comyn's Digest, under head of "Franchise," Vol. IV., p. 465, is given this short definition, viz.:

"A corporation is a body constituted by policy, with a capacity to take or to do."

Another brief definition of a corporation is:

"A collective body composed of different persons."  
Railroad vs. Knox & Co., 98 Ala., 121. Corey vs.  
Wadsworth, 118 Ala., 488.

See in this connection the following cases:

Paschell vs. Whitsett, 11 Ala., 472.

Tuscaloosa Scientific, etc., Assoc. vs. Murphy, 58 Ala.,  
54.

Tuscaloosa S. & A. Ass'n vs. State, 58 Ala., 54.

The definition of Morawetz, *supra*, is substantially adopted in American and English Encyclopedia of Law, Vol. 7, p. 632 (2d Edition).

Again in Morawetz, it is said:

"The rights and obligations of the association are in reality rights and obligations between the shareholders; yet, they can be measured and enforced only by regarding them as rights and obligations between the original shareholders and the association as an entity."

Morawetz, sec. 227.

"In equity, the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all."

Ibid.

There are instances wherein the courts are obliged to take cognizance of the real nature of corporations and to treat them as an association of individuals.

Ibid, sec 230.

Mr. Justice Beck in a leading case has said:

"The legal rule which regards a corporation as an

artificial person, to be barred only by acts done in accordance with its charter which permits it to hold property as a natural person, and limits the interest of the shareholder therein to his shares, must all go down when they are attempted to be used as instruments of fraud by the dishonest and stand in the way of equity."

Desmoines Gas Co. vs. West, 50 Iowa, 16-25.

"The same persons may fill the office of president of two distinct corporations, and such identity does not, of itself, invalidate dealings between the two corporations."

Leathers vs. Janney, *et al.*, 41 Lawyers' Ann. Rep.

1120.

Again we read:

"Perhaps the best definition yet constructed is that given by the earliest writers on the subject, who define it to be 'A collection of individuals united in one body, under a special denomination, having perpetual succession, under an artificial form, and vested by the policy of the law with acting in several respects as an individual, particularly of taking and granting property, or contracting obligations, and of suing and being sued, and of enjoying privileges in common, and exercising a variety of political rights more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence.'" See Beach on Private Corporations, Vol. I., p. 4, sec. 1.



In line with the foregoing, in Virginia the question of the "Status" of a corporation was under consideration in 1890. In the opinion of the court in this quite prominent case, these words occur, viz.:

"The question raised by the pleading in this cause is whether or not 'corporations' are included in the term 'persons.' For civil purposes, corporations are in law deemed persons."

Baltimore & Ohio R. R. Co. vs. Gallahue's Armis,  
12, Gratt (Va.), 663.

This was the rule at Common Law; 2 Inst., 697-703.

**The Civil law.** — The Code of Justinian treats of the "*Res Universitas*," which was a corporate body that existed when a number of persons were so united that the laws take no note of their separate existence, but recognize them only under a common name which is not the name of any of them.

(D. 3, 4, 1); D. 3, 4, 7, 1.)

All the members are considered in the law as a single unit or being (D. 46, 1, 22); such units are sometimes called fictitious persons because the corporate body, as such, may sue and be sued, receive or part with property, bind itself or bind others through some agent or syndic (D. 3, 4, 1, 1); its chief characteristic is that it does not necessarily die (D. 5, 1, 76); and is not created by private agreement. It requires the authority of the Statute, "*Lex*," "*Senatus Consultum*," or Constitution of an Emperor (D. 3, 4, 1 pr.).

A corporation is called "*Collegium*," "Company" or "Society."

See Roman Law by Hunter (London Ed., 1885. Wm. Maxwell & Son), Vol. I., p. 314, *et seq.*

**The corporation is a distinct entity.**—The great expounder of law, speaking of corporations, says:

“But when they (individuals) are consolidated into a corporation, they and their successors are considered one in law; as one person they have one will, which is collected from the sense of the majority of the individuals; this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of the little republic, or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws.”

Blackstone's Com's, sec. 468, etc.

Chief Judge Ruger, quoting and approving an earlier decision, said:

“Judge Jackson, delivering the opinion of the court in a former case, says:

“‘In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on, and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts and be responsible for its obligations. And that entity is alone responsible to persons dealing with it for the conduct of such business.’”

People vs. American Bell Telephone Co., 117 N. Y.,

That a corporation is such a legal entity, distinct from its stockholders and creditors, is sustained in *Watson vs. Borfile*, 116 Fed. Rep., 157, and *Lange vs. Burke*, 69 Arkansas, 85, the latter case citing, *Farmers Loan & Trust Co. vs. N. Y. & N. R. Co.*, 150 N. Y., 410-430.

The extent to which this rule and principle has been upheld, and how far the courts have gone in sustaining the individuality of corporate existence, is seen in

*Fitzgerald vs. Missouri Pac. R'way Co.*, 45 Fed. Rep., 812, wherein it was held that:

"A consolidated corporation which bears the same name in three States and has one board of directors and the same shareholders, and operates the road as one entire line and is designed to accomplish the same purpose, and exercises the same general corporate powers in all the States, is not the same corporation in each State. The owner of all the stock and bonds of a corporation does not own the corporate property."

*Buffalo L. T. & S. D. Co. vs. Medina Gas Co.*, 162 N. Y., 67.

*Saranac & L. P. R. R. Co. vs. Arnold*, 167 N. Y., 368.

The whole trend of opinion is that each corporation is a separate and distinct "legal entity," and stands on its own bottom; however intimately they may be associated, or however closely they may be allied in their business relations with others, each corporation speaks and acts for itself and is alone responsible for its acts.

The same principle is sustained in  
Richmond and I. Const. Co. vs. Richmond, etc., 68  
Fed. Rep., 105.

In *Lange vs. Burke*, *supra*,—Judge Battle, in delivering the opinion of the Court, said:

“A corporation is an artificial being, separate and distinct from its agents, officers and stockholders. Its dealings with another corporation, although it may be composed in part of persons who own the majority of the stock in each company, and may be managed by the same officers, if they be in good faith and free from fraud, stand upon the same basis, and affect it and the other corporation in the same manner, and to the same extent that they would if each had been composed of different stockholders and controlled by different officers.”

To the same effect see  
*Waycross Air Line R. R. Co. vs. Offerman, etc.*, R. R.  
Co., 109 Georgia Rep. 827.

A leading case was decided in the Supreme Court of Georgia in 1895, to wit:

*The Exchange Bank of Macon vs. The Macon C. Co.*,  
97 Ga., 5.

The opinion of the Court was read by Mr. Justice Lumpkin, who ably reviews the prevailing decisions both in this country and in Great Britain. The opinion is in part:

“Every corporation is a person—artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a



corporation, or who own its stock, or control its affairs, are the corporation itself; and when a single individual composes a corporation he is not himself a corporation. In such case the man is one person, created by the Almighty, and the corporation is another person, created by law. It makes no difference in principle whether the sole owner of the stock is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned, as the man is from the corporation of which he is the sole member.

"That a business corporation is a separate legal entity, and as such owns the property pertaining to it, is recognized by Mr. Justice Nelson, in the case of *Van Allen vs. The Assessors, etc.*, 70 U. S., 573, 584, as familiar law, and in this connection he cites

*Queen vs. Arnaud*, 9 A. & E. (new series), 806, and quotes from Lord Denman as follows:

"It appears to me that the British Corporation is, as such, the sole owner of the ship. The individual members of the corporation are, no doubt, interested in one sense in the property of the corporation, as they derive individual benefits from its increase or lose from its decrease; but in no legal sense are the individuals the owners."

"In *Buton vs. Hoffman*, 61 Wisc. 20 s. c. 50 Am. Rep., 131, Mr. Justice Orton said:

"From the very nature of a private business corporation, indeed of any corporation, the stockholders are not the private and joint owners of its property. The

corporation is the real, though artificial, person substituted for the natural persons who procured its creation and have pecuniary interest in it, in which all its property is vested, and by which it is controlled, managed and disposed of. \* \* \* In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity."

Ibid.

In support of his position Mr. Justice Lumpkin cites numerous additional cases, among others

Pullman P. Car Co. vs. Mo. Pac. Co., 115 U. S., 587;

A. T., etc., Co. vs. Cochrane, 45 Kansas, 225; and

"That most excellent work"—Cook on Corporation Law, Vol. I., sec. 6,

together with the authorities mentioned in the notes.

**Authorities generally.**—A review of some definitions of corporations will be found in "Thompson's Commentaries on the Law of Corporations," Vol. I., sec. 2. These, however, do not differ materially from those hereinbefore noted. Also, see "Waterman on the Law of Corporations," Vol. I., sec. 5, giving the definitions enunciated by Kyd and other early writers substantially as hereinbefore contained.

**Origin of business corporation idea.**—A word as to the origin of the modern business corporation may not be out of place at the inception of our work.

In many instances in the books the similarity between stock corporations and partnerships has been

discussed. It would seem that the following extract from the standard and well-approved work of Angel and Ames will, for the purpose of this book, give all that is needed on that phase of the subject.

Angel and Ames on Corporations, 10th Ed., Boston, 1875, pp. 32 and 33.

“The difference between a company established for private hazard and profit by an act or charter of incorporation and an ordinary copartnership is obvious and striking. The latter is simply a voluntary contract, and the result of such a contract, whereby two or more persons agree to combine their property or labor, or both, for the purpose of a common undertaking and the acquisition of a common profit; and the gain or loss is to be proportionately shared between them. But this definition greatly falls short of a company established as a body corporate, which, though originating in a voluntary contract, is the result not only of that, but of its confirmation by special legislative authority. This confirmation is indispensable to enable the parties to the compact to sue and be sued, as a company, by a general name, to act by a common seal and to transmit their property in succession. One, if not the principal and main inducement, in procuring an act of incorporation is to limit the risk of the partners and to render definite the extent of their hazard; for it is a perfectly well-settled rule of law that each member of a common partnership, whether active, nominal or dormant, is the accredited agent of the others, and, as such, has authority to bind them, to the extent of their private property, by any

simple contract he may make, either respecting the goods or business of the concern, or by negotiable instruments in its behalf to any person dealing *bona fide*. This personal responsibility of stockholders is inconsistent with a perfect body corporate; and therefore, where an execution issued against a corporation by the name of the 'President, Directors and Company,' with special instruction to the officer to take their bodies for want of estate, no authority was communicated to him thus to do. And the stockholders of a corporation do not become liable as partners, on notes given by the treasurer of the corporation, merely because, after organizing under the act of incorporation, no corporate business is transacted or because the notes were given for debts beyond the corporate authority of the company.

"Section 42.—With the view of encouraging persons to an active and useful employment of their capital, a species of partnership has been introduced in different parts of the world, with a restricted personal responsibility and it, on that account may be called a *quasi*-corporation, and therefore is entitled to attention in treating of private, civil and commercial corporations.

"Though the English law does not admit of partnerships with a restricted responsibility, they have been established in different parts of the Continent and in this country.

"In France, by the celebrated ordinance of 1673, *la Société en commandite*, or a limited partnership, was

introduced for promoting the interests of the mercantile community and the benefit of the public, by which one or more persons were associated with one or more sleeping partners, who furnished a certain proportion of capital and were liable only to the extent of the funds furnished. This peculiar kind of partnership has been continued by the new commercial code of France. It has been introduced in the civil code of Louisiana under the title of "Partnership in Commendam." On account of its tendency to invite dormant capital into useful and active employment, it has obtained a very considerable extent of favor throughout the United States, and accordingly it has been authorized by a legislative enactment in the States of New York, Massachusetts, Rhode Island, Connecticut, Vermont, New Jersey, Pennsylvania, Maryland, South Carolina, Georgia, Alabama, Florida, Mississippi, Indiana and Michigan. The provisions of the New York act have been taken, in most of the essential points, from the French ordinance and code above named; and the provisions for limited partnerships in the other States (and which were subsequent in point of time to that of New York) is essentially the same. It is the first instance, says Kent, in the history of the legislation of New York, that the statute law of any other country than Great Britain has been closely imitated and adopted."

Hence it appears that the idea contained in the limited partnership has been amplified, perfected and em-



bodied in the stock corporation, now in general use in conducting business ventures.

**Substantial harmony of definitions.** — The greater part of the differences of opinion and the consequent discussion concerning the definition of a corporation can, in the light of the foregoing citations and quotations, be satisfactorily harmonized. In the first place, it is axiomatic that all powers spring primarily from the Sovereign, or the People. In the case of these the latter, the People, select their representatives, to wit, the legislature. To this body is given the power to create corporations and endow them with powers, rights, privileges and immunities; subject, however, to such duties, obligations and conditions as the legislature may deem proper. Such powers, etc., must be within the constitution and the law, State and Federal. And right here, in this power and capacity to create out of certain persons and their successors an "artificial person," a "legal entity," a "body corporate," and giving it a name, make it a resident of the State, with power to buy and sell and to exercise the other powers, etc., belonging to natural persons, will be found the stumbling-block in the way of many who have discussed the subject. The fact is that the corporation, at its inception, is composed not alone of the living, existing individuals who are described *eo nomine* in its charter, but of their successors as well, whoever they may be. These successors are a part of the corporation, although time alone can disclose their identity. So that while the most upright and honorable men im-

aginable may be created into a corporation and, so long as these particular persons live, may attach to such corporation the idea of honesty and high character, the uncertainty of life and of human affairs renders it beyond the realms of possibility to say what may be the character of their successors. There may be probabilities concerning the matter, even of the strongest kind, but these must surely yield to the actual course of events. Succession is accordingly one of the most vital elements of a corporation.

Shares of stock are very convertible and pass from owner to owner with ease and quickness. A few months, nay, even a few weeks, may see the original corporators pass from the scene and the unknown successors seated in their place; how, then, can it be claimed with reason that the corporation and its stockholders are one?

So, then, the long-established and well-authenticated definitions must still prevail, notwithstanding all attempts to banish the "legal fiction."

**Substance of definitions.** — The following is the substance of the definitions as they relate to the distinction between the artificial body and its component parts, viz.:

A corporation is an "artificial person," a "legal entity," entirely separate, distinct and apart from the persons who own and hold its capital stock, just so long and so far as justice and equity require it to be thus considered; but when it clearly appears that such

“entity” and its concomitant powers, rights, etc., become weapons to defeat the purposes or objects for which the corporation was formed, or subversive of honesty and tending to some wrongful end — then, immediately, the corporation becomes, in Equity, an association of individuals whose wrong-doing the courts will restrain or remedy.

## CHAPTER II.

### Situs :

The Corporate home. — Recapitulation. — Further authorities. — Situs as it affects foreign corporations.

**The corporate home.**—A corporation may have a “local habitation,” be a resident and enjoy the privileges and protection of citizenship, so far as the limitations of its capacity permit.

The situs, residence, or, if the term may be permitted in that connection, the “home” of a corporation, is comprised within the confines of the State which created it.

This is very clearly the consensus of the decisions.

In Clark and Marshall the rule is stated in the following words :

“In a sense, and for some purposes, a corporation may be regarded as a citizen, resident or inhabitant of the country or State, by or under whose laws it was created.”

Vol. I., p. 351, sec 114.

“In construing the Constitution of the United States and the acts of Congress in pursuance thereof, applying to actions by or against corporations in the United States Supreme Court, a corporation is to be deemed a citizen of the State creating it.”

Ibid.

"A corporation, as has been said, is an artificial being: it has no dwelling, either its office, its depots, or its ships. Its domicile is the legal jurisdiction of its origin, irrespective of its officers or the places where its business is transacted."

Potter on the Law of Corporations, Vol. I., p. 12,  
sec. 10.

In one of the earlier U. S. Supreme Court cases (Feby. Term, 1809), Chief Justice Marshall said:

"As our ideas of a corporation, its privileges and disabilities, are derived entirely from the English books, we resort to them for aid in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible and incorporeal. Yet when we examine the subject further we find that corporations have been included within terms of description appropriate to real persons."

The Bank of the United States vs. De Neaux, 5 Cranch (U. S.), 61.

In the same case the distinguished Chief Justice quotes Lord Coke:

"Every corporation and body politic residing in any county, riding, city, or town corporate, as having any lands or tenements in any shire, "*Quæ proprius manibus et sumptibus possident et habent*," are said to be inhabitants there within the purview of the statute."

Ibid.

It is appropriate to note that while the English corporation of that early period had elements which do



not pertain to the private business corporation of to-day, yet this ancient principle still prevails.

Mr. Spelling says :

“The law of the State where a corporation is created fixes, limits and qualifies its franchises, powers, capacities and liabilities.

“While the domicile of a corporation is in the legal jurisdiction of its origin and in its nature incapable of emigration, yet its charter may confer powers without territorial limitation and these may be exercised elsewhere if they are in conflict with no restriction of “local law.”

Spelling on Private Corporations, Vol. I., p. 92, sec. 76.

“A corporation, like a natural person, can have but one legal residence, and in the Federal Courts no averment or proof to its citizenship elsewhere is permitted.

Ibid, p. 94, sec. 77.

and *vide* cases cited.

In

Ex parte Schollenberger, 6 Otto, U. S. Supreme Court,  
369, 377 (1877),

Chief Justice Waite said :

“A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its Charter or excluded by local law.

"A corporation can have but one legal residence, and that within the State or Sovereignty creating it, though comity allows it to do business within other jurisdictions."

Chaffee vs. Fourth National Bank of N. Y., 71 Maine, 514.

"A corporation can have but one legal residence, and that must be within the state or sovereignty creating it, although, by comity, it may be allowed to do business through its officers or agents in other jurisdictions."

Ireland vs. Globe Milling, etc., Co., 19 Rhode Island, 180 (Supreme Court, 1895).

Opinion of the Court by Mr. Justice Tillinghast.

"A corporation has its domicil in the State from which it derives its existence."

Halbrook vs. Ford, 153 Ills., 633. S. C., 46 Am. St. Reps., 917.

To the same import as above see

Combes vs. Keyes, 89 Wisc., 296. 46 Am. St. Reps., 839.

Douglass vs. Phoenix Ins. Co., 138 N. Y., 209.

And in

Young vs. South Tredgar Iron Co., 85 Tenn., 189, the principle is sustained, at least by indirection, the case holding that the situs of a corporation determines the situs of its stock without regard to the locality of the stock certificate.

"Corporations are citizens and residents of the State under the laws of which they were created, and they cannot by engaging in business in another State acquire a residence there."

Opinion of Mr. Justice Shiras (subsequently of the U. S. Supreme Court), in  
Fales vs. Chicago M. & St. P. Ry., 32 Fed. Rep.,  
673, 679.

The judgment of a court of competent jurisdiction of any particular State, holding that a corporation is a resident of that particular State, is binding upon the Federal Courts.

Fitzgerald vs. Missouri P. Ry. Co., 45 Fed. Rep. 812.

The case of

Plimpton vs. Bigelow, 93 N. Y., 592,  
has often been approvingly cited in the courts throughout the United States. The opinion is by that very able and distinguished jurist, Mr. Justice Andrews, and contains the following:

"But we regard the principle to be too firmly settled by repeated adjudications of the Federal and State Courts to admit of further controversy, that a corporation has its domicile and residence only within the bounds of the Sovereignty which created it; it is incapable of passing individually beyond that jurisdiction, and so may not be deemed present in a State other than that of its origin, although its officers are present and it transacts business in that State."

Citing, Bank of Augusta vs. Earle, *supra*.

La Fayette Ins. Co. vs. French, 18 How. (U. S.), 404.

**Recapitulation.**—It is by no means going too far to say that this holding of the New York Court of Appeals has established the following points:

(a) That a corporation has a domicile and residence within the bounds of the State or Sovereignty which created it.

(b) That such corporation is not capable of being, and cannot be, present or exist beyond or outside of such bounds, although, as will be seen, business may be carried on without such bounds through agents and representatives.

(c) That a corporation possesses the right to be called and treated as a resident, and even be said to be a "citizen," by means of the "fiction" above described.

**Further authorities.**—Chief Justice Andrews, in a subsequent case, sustains his opinion in *Plimpton vs. Bigelow*, *supra*, as follows:

"A domestic corporation has at all times its exclusive residence and domicile in the jurisdiction of its origin."

*Douglass vs. Phoenix Ins. Co.*, 138 N. Y., 209.

Some further remarks will be made and citations given affecting the home of the corporation, in a subsequent chapter on Foreign Corporations and the Comity of the States (see Chapter III.), as the latter subject also involves the question of the situs or domicile of the corporation.

Concerning the "domicil" of corporations, Dicey thus speaks:

Rule 19.—The domicil of a corporation is the place considered by law to be the center of its affairs, which (1) In the case of a trading corporation is its principal place of business, *i. e.*, the place where the administrative business is carried on. (2) In the case of any other corporation is the place where its functions are discharged.

Comment:

"The conception of a home or domicil, depending as it does on the combination of residence and intention to reside, is in its primary sense applicable only to human beings; but by a fiction of law an artificial domicil may be attributed to legal beings or corporations."

Dicey on the Conflict of Laws, Rule 19, etc., p. 154 (London Ed., 1896).

An interesting case touching the question of corporation domicil is

Aspinwall vs. The Ohio & M. R. R. Co., 20 Indiana, 492.

Therein Mr. Justice Perkins enunciates the rule as to situs as follows:

"1. The authority given by the legislature of Indiana to the corporation created by that body to own and manage property in Ohio did not include in it the authority to the corporation to change its domicil in that State.



"2. The authority given to the Indiana corporation by the legislature of Ohio to act in that State did not confer upon it, in the absence of authority from Indiana, the right to migrate to that State, as Indiana Corporate State laws as a general proposition do not operate extra-territorially. . . .

"Turning to Grant on Corporation, an English book, we find it states on side page 14, 'That the old law was that every corporation must be constituted (in the charter) of some place.' But it is presumed that this rule has long been obsolete, if it were ever good, except in the case of corporations entrusted with some local jurisdiction, or with powers and privileges, the exercise of which was from their nature connected with some locality. \* \* \*"

"Corporations, in this country, are treated as having domicils or residences, in determining the question of jurisdiction as between the States and the U. S. Courts and also upon general principles."

See cases cited.

A corporation is a resident of the State, alone, which creates it.

Cook vs. Hager, 8 Colorado, 386.

While it is competent to prohibit a foreign corporation from acquiring a domicil in the State, it cannot be prohibited from selling, by contracts made there, its machinery manufactured elsewhere; for that would be to regulate commerce among the States.

Utlery vs. The Clark-Gardner Lode Mining Co., 4 Colorado, 369.

Citing: Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

**Situs as it affects foreign corporations.**—Corporations are deemed “persons” when the circumstances in which they are placed are identical with those of natural persons, expressly included in the statutes.

Home Ins. Co. vs. City Council of Augusta, 50 Ga., 530.

In the above case Mr. Justice Trippe discussed the question of “foreign” and “domestic” corporations, and the question of how far corporations are to be treated in the same manner as natural persons.

“Foreign” corporations and their powers without the State is the subject discussed in

Union Branch R. R. Co. vs. East Tennessee, etc., R. R. Co., 14 Ga., 327;

also in

Port Royal R. R. Co. vs. Hammond, 58 Ga., 527.

Wood, etc., Hydraulic Mining Co. vs. King, 45 Ga., 34.

In the first (*i. e.*, 14 Ga., 327), Mr. Justice Starres said:

“It is true that a corporation can have no legal existence out of the sovereignty by which it is created, yet it does not ensue that its existence as an artificial person, capable of contracting, may not be recognized elsewhere. In the language of Chief Justice Teney, in Bank of Augusta vs. Earle, 13 Pet., 588, its residence in one State creates no insuperable objection to its contracting in another.”

page 341.

In

Port Royal R. R. Co. vs. Hammond, *supra*.

Warner, C. J., said:

"The defendant is a Georgia corporation created by an act of the general assembly of this State, and its powers and duties are to be exercised and performed within the territorial limits of the State."

A private corporation whose charter has been granted by one State cannot hold meetings and pass votes in another State. See

Land Grant Ry. Co. vs. Commrs. of Coffee Co., 6  
Kansas, 253.

Opinion of Mr. Justice Valentine (2 cases).

The case sustains the antiquated doctrine that a corporation cannot exist without the confines of its creating State.

"A corporation created by the State of Pennsylvania, which cannot have an office or do business in the State, cannot do business in the State of Kansas."

Land Grant, etc., Co. vs. Commrs. of Coffee Co., 6  
Kansas, 245.

"Under the rules of 'comity' a foreign corporation may by its agents usually exercise in another State all the powers which it could exercise in its own State, which are not repugnant to the laws and institutions, nor prejudiced to the interests of such other State."

Ibid.

In the foregoing is embodied a concise statement of the whole subject.

"A corporation obtains a residence, not by its own act, but by legal authority."

Newport, etc., Bridge Co. vs. Waverly, 78 Ky., 523.

"\* \* \* But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution, which declares that the citizen of each State shall be entitled to all privileges and immunities of the citizens of the several States."

Paul vs. Virginia, 75 U. S. (8 Wall), 168 (1868).

"A corporation of Utah is a citizen of the State."

Postal Teleg. Cable Co. vs. Oregon Short Line Ry. Co., 23 Utah, 474.

In

Graham vs. Baston, etc., R. R. Co., 118 U. S., 161, 162, it is held:

"A railroad corporation which, though made up of distinct corporations, chartered by the legislatures of different States, has a capital stock which is a unit and only one set of shareholders, who have an interest, by virtue of their ownership of the stock, in all its property elsewhere, has a domicile in each State, and the corporations or shareholders can, in the absence of any statutory provision, do the corporate business in any one State, so as to bind the corporation as to its property elsewhere."

## CHAPTER III.

## Foreign Corporations and Comity.

A discussion of the principles involved. — Authorities considered.

A discussion of the principles involved.—Some confusion has naturally arisen in the decisions and text-books, growing out of the inaccurate terms which are customarily employed to designate respectively:

1. Corporations which were created and have their home offices without the particular State; and,
2. Those whose domiciles are within such State.

For all except those persons who are especially versed in corporate affairs this confusion of terms is both unfortunate and misleading.

The primary cause of this difficulty lies in the complicated system of our Government and in the fact that the names originally selected to express the relation of these corporations to the creating powers were ill-chosen.

Each sovereign State, while retaining and continuing to exercise the power to institute and govern corporate bodies, is a distinct and separate entity; yet, all these States are bound together by the Constitution, and by numerous ties, into one community, and flourish under one common name.



This condition, however, has no recognition in the words employed to designate resident and non-resident corporations of the several States, and hence the confusion above noted. The terms "domestic" and "foreign" have alone been used, and then only to point out the fact as to residents in each particular State; whereas, by general consent, these words have a wider significance in their usual application, and refer to the bounds of the United States rather than to the confines of any of its component States. The word "foreign," then, when applied by a citizen of New York to a real or artificial person domiciled within the State of Connecticut or New Jersey, is out of place and entails a misnomer.

In aid of accuracy of expression there should be employed three terms to describe as many classes, viz.:

"Resident," that which is domiciled within the creating State.

"Domestic," whose domicil is in another State, Territory or colonial possession.

"Foreign," whose domicil is without the confines of the United States.

It certainly appears anomalous that a bolt of cloth manufactured in the State of Rhode Island should be called "domestic" in the State of New York, while the company which manufactured it should be known as "foreign."

Notwithstanding this anomaly, we are compelled to use the terms as they are now current. As it is, the "domestic" corporation of one State is "foreign" in the next, and thus a system of nomenclature appears

to be forced upon us in connection with the present work; and we use the terms "domestic" and "foreign" as is customary to the profession and in the classification in vogue.

It is of these "foreign" corporations as a class that this chapter treats.

It has been laid down, as hereinbefore noted, that a corporation can act only within the confines of the State which created it; and the general principle is, that beyond those confines its attempts to exercise any of its powers are absolutely futile and of no effect. Such is the principle and the technical state of affairs. But by the "comity" of the States (a discussion of which as to its origin, etc., cannot be entered upon here), all of the States allow the "foreign" corporation to transact business within their borders by and through the policy of permitting such "foreign" corporation to appoint and authorize duly accredited officers and agents to conduct their affairs. Thus, the business proceeds with the same practical effect and accomplishes the same objects as if the corporation itself had been domiciled within the "foreign" State.

It must, however, be remembered that the performance of such acts is purely by sufferance and is subject to the rules, regulations and conditions prescribed and imposed by the sister State, and that any violation thereof may debar such "foreign" corporation from further indulgence. There is also the ever present provision that the business to be transacted is not contrary to the laws of the State exercising the comity.

The whole subject is one not only of great interest, but of great importance, and has been the cause of much discussion in the courts.

**Authorities considered.** — Harlan, J., in *Christian Union vs. Yount*, 101 U. S., 352, 356-358, has entered quite fully into the question of "comity":

"Although, as a general proposition, a corporation must dwell in the State under whose law it was created, its existence as an artificial person may be acknowledged and recognized in other States.

"Its residence in one State creates no insuperable objection to its powers of contracting in another. *Runyan vs. The Lessee of Castor*, 14 Pet. U. S., 122.

"In *Cowell vs. Springs Co.*, 100 U. S., 55, we said: 'If the policy of the State or territory does not permit the business of the 'foreign' corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allow corporations to be formed only by the general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged without question in business in States where the creation of corporations by special enactment are forbidden.' In harmony with the general law of comity obtaining among the States composing the union, the presumption should be indulged that a corporation of one State, not forbid-

den by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy to be deduced from its general course of legislation, or from settled adjudications of its highest court."

In regard to the comity of the States and the treatment of corporations of other States by local courts, the following is of interest, as showing the prevailing spirit:

"\* \* \* The powers thus conferred are broad enough to cover a trust of this character, there being nothing in other portions of the charter, or the laws of the State of New York, which, by necessary implication, limits the grant. The Supreme Court of New York, by confiding this trust to the charge of the corporation, necessarily decided that the corporation had powers to execute it and although such decision is not absolutely binding upon us, when property rights in this State are drawn in question, yet, in the absence of valid reasons assigned to the contrary, it is necessarily controlling."

Opinion of Rombauer, P. J., in *Glasser vs. Priest*, St. Louis and Kansas City Court of Appeals Reports, Vol. XXIX., 1 (1887).

The very learned Mabry, C. J., writes as follows, in a leading case:

"In case of *Bank of Augusta vs. Earle*, 13 Peters, 519, it is said: 'A corporation can have no legal exist-

ence out of the boundaries of the sovereignty by which it was created.' It exists only in contemplation of law and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty; but though it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court."

The same distinguished chief justice held in the same case, in substance,—that where a corporation has been legally created and organized under the laws of a sister State for the transaction of any business there, it may, by comity existing between the States, transact business in the State, provided it be not in contravention of our laws or public policy.

Duke vs. Greenfield, 19 Southern Rep., 172 (Florida).

Again, the same approved authority held that:

"A corporation created under the laws of one State could not hold corporate meetings in another for the purpose of organizing the corporation, or performing any strictly corporate functions in its organization."

*Ibid.*



A corporation organized in another State may transact business in this State (Arkansas), subject to the conditions prescribed with reference to foreign corporations.

Boyington vs. Van Etten, 62 Ark., 63.

A New Jersey corporation which purchases the property of corporations of Colorado and Illinois, and complies with the statutes of Colorado, relative to foreign corporations, by designating a place of business in that State, does not in all respects become a Colorado corporation by virtue of the Colorado statute.

Rust vs. United Waterworks Co., 70 Fed. Rep., 129.

Concerning the right of domestic shareholders to restrain foreign shareholders, see

Brown vs. Republican Mountain Silver Mines, 55 Fed. Rep., 7.

The principle that a corporation may be under the joint recognition and control of more than one State, without impairment of chartered rights, is sustained by the opinion of Starrs, Ch. J., in Bishop vs. Brainerd, *supra* (28 Conn., 289):

“Nor do we see any objection, technical or otherwise, to the parting, by two or more States unitedly, in the exercise of their sovereign authority, with such of their respective forms as shall be necessary in order to confer upon persons, natural or artificial, the franchise or privilege of being a corporation, and with such powers and privileges as they shall deem it proper to grant to them, and this power has been not unfrequently exercised by States without question or objection.”

"It would be a delicate matter for this court to declare the acts of a sister State invalid, on the ground of a supposed conflict with the constitution of that State."

Ryan vs. Vallindigham, 7 Ind., 416.

The statutes of Indiana define a foreign corporation to be one created by or under the laws of any other State, government or country.

Daly vs. The Nat. Life Ins. Co., 64 Ind., 1.

Opinion by Hawk, Ch. J.

"Under the rules of 'Comity' a foreign corporation may by its agents usually exercise in another State all the powers which it could exercise in its own State, which are not repugnant to the laws and institutions, nor prejudicial to the interests, of such other State."

Valentine, J., in Land G. Ry. Co. vs. Comm'rs of Coffee Co., 6 Kansas, 245-254.

"Foreign" corporations are entitled to do business in any other State outside of their own home State only through the comity existing among the States.

State vs. Hammond Packing Co., 110 Louisiana Rep. 180.

"This 'Comity' may be modified or withdrawn under statute enacted in pursuance of an article of organic law, provided the modification or withdrawal does not come in conflict with the paramount laws of the Union."

Ibid.

Citing: Bank of Augusta vs. Earle, 13 Peters, 588.

The above case holds the doctrine that the sister State may, if she so chooses, prohibit the corporations of other States from doing business within her territory.

Citing: *Paul vs. Virginia*, 8 Wallace, 177 (75 U. S.).

This rule is affirmed in *Ducat vs. Chicago*, 10 Wallace, 410-415 (77 U. S.).

"A State may permit foreign corporations to do business within its confines within limits and such rules, terms and conditions as it may prescribe not inconsistent with laws, etc., of the United States."

*Cousens vs. Lovejoy*, 81 Maine, 467 (Syllabus).

The question of foreign corporations, with particular regard to their taxations, is treated of in:

*People ex rel Penn. R. R. Co. vs. Wemple*, 138 N. Y.,

I.

*People ex rel Edison Electric Light Co. vs. Campbell*, 138 N. Y., 543.

In Virginia the right of a State to forbid foreign corporations to transact business within its borders is asserted:

*Slaughter vs. Commonwealth*, 13 Grattan (Va.), 767.

Comity between the States authorizes a corporation to exercise its charter powers within another State; but it does not permit the exercise of a power when the policy of that State, distinctly marked by legislative enactments or constitutional provision, forbids it.

*McDonough vs. Murdoch*, 15 How., 367 (56 U. S.).

The following decision displays the fact that courts of equity will disregard the principle of comity and

assume to dictate the conduct of foreign corporations, when right and justice so require:

"The defendants Greene, the Cobre Company, the Cananea Company and the Greene Company, are all properly before the Court. The Court will, therefore, have jurisdiction of the parties, and may, we think, without infringing upon any rule of comity, or upon this rule forbidding interference with the internal affairs of a foreign corporation, try the issue to this conspiracy and fraudulent agreement, under which it is proposed on the part of the appellants to divest the Cobre Company of all its property without consideration, and may, if the facts show and the circumstances then existing seem to warrant that course, perpetually enjoin the consummation of such fraudulent contract and transfers of the property of the Cobre Company, and require an accounting and compel the restoration of any of its property appropriated by the defendants, even though such decree will operate upon property beyond the jurisdiction of the court."

Hallenburg vs. Greene, *supra*, 66 App. Div., 590 (December, 1901).

"The comity of nations distinctly recognizes the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restriction and burthens imposed by the

laws enforced therein; for there can be no doubt that a State may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such proper terms and conditions as it may prescribe."

Canada Pacific Ry. Co. vs. W. U. Tel. Co., XVII.,  
Canadian Sup. Ct., 151.

In the above Chief Justice Sir W. J. Ritchie quoted from Dicey's Law of Domicile, Rule 42, 198:

"The existence of a foreign corporation duly created under the law of a foreign country is recognized by our courts.

"The principle is now well established that a corporation duly created in one country is recognized as a corporation by other States. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals."

The distinguished Chief Justice also cites:  
Story on Conflict of Laws, Chap. IV., sec. 106:

"The power of a corporation to act in a foreign country depends both on the law of the country where it was created and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the laws forbid it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits."



Citing, *Liverpool Ins. Co. vs. Man.*, 10 Wall (U. S.).  
566.

*Att'y Gen. vs. Bay State, etc.*, 99 Mass., 148.

*Barr vs. Poole*, 12 N. Y., 495, and

*Phoenix Ins. Co. vs. Comm., etc.*, 5 Buch (Ky.), 68.

He also quoted extensively and approvingly the celebrated case of *Bank of Augusta vs. Earle* (13 Peters, U. S., 588).

The question of the powers of foreign corporations was before the Court of Appeals of the District of Columbia, in the case of the *Eastern Trust and Banking Co. vs. Willis*, Vol. VI., App. Cases, D. C., p. 375 (Tucker, 1895).

The appellant in this case, by Mr. Leighton of counsel, contended that a charter of incorporation imparts to the body corporate individuality and personality. Within its scope, terms and provisions, the corporation may do whatever a natural person, acting in his legal capacity, might do. This faculty thus created (it was insisted), it possesses and may exercise as certainly as an individual, not only in the place of its creation, but elsewhere, unless forbidden by law or the policy of the foreign State.

Citing: *Lathrop vs. Bank*, 8 Dana, 114;

*Ins. Co. vs. Cross*, 18 Wis., 119;

*Cowell vs. Springs Co.*, 100 U. S., 56.

The opinion of the court in the case was delivered by Mr. Justice Shepard, who said:

“\* \* \* The terms of the charter are ample to cover all the powers it may exercise under said trust

deed, and there is nothing therein to indicate that its corporate powers can only be exercised within the limits of the State of its creation (Maine). Appellant had the undoubted right, in so far as its act of incorporation is concerned, to do business in the District of Columbia, to accept trusts to be performed therein and to sue in its courts."

(Citing, *Bank of Augusta vs. Earle*, *supra*.)

"The mere fact that the laws prevailing in the District of Columbia at that time did not authorize the organization of corporations with the same powers that had been conferred upon appellant by the laws of Maine, is not sufficient to prevent it from the exercise of its powers in said District. A settled policy of prohibition is not to be inferred from the mere absence of legislature upon the subject. This is the well-established doctrine of the Supreme Court of the United States."

(Citing, *Cowell vs. Springs Co.*, 100 U. S., 55-59.)

## CHAPTER IV.

### Rights and Powers.

Relation to preceding chapters. — Sources of corporate powers. — Charter as a source of powers. — Enumeration of principal powers. — Extent of powers. — Powers by implication. — Limitations of powers.

**Relation to preceding chapters.**—Having devoted the First Chapter to the much-discussed question of what private business corporations are, with an appropriate reference in the Second Chapter to the question of their *situs*, and having in the preceding chapter touched upon their rights beyond the “home jurisdiction,” it now becomes necessary to enumerate, in a general way, what rights and powers these corporations enjoy, reserving for later consideration the duties and obligations which accompany and qualify the same.

**Sources of corporate powers.**—And before speaking of these powers and rights, it seems fitting in the first place to turn our attention briefly to the source from whence all these various rights, powers and privileges are derived.

This, like the subject of corporate definitions, has been greatly discussed, occasioning an accumulation of learned disquisitions, in which there has appeared considerable diverseness of opinion with some contradiction.

While it is not within the scope of this work to offer extended dissertations upon the fundamental questions which affect corporations, it is not only appropriate but imperative, for a full and complete understanding of the subject, that there should be briefly outlined some of the underlying principles which have a direct bearing upon the situation. Without a definite knowledge and appreciation of these, the tenor and effect of the many extracts hereinafter contained cannot be clearly understood.

**Charter as a source of powers.**—It is a well known elementary truth that all the powers and rights which are exercised and enjoyed by corporations come to them by means of a Charter: In England, it is a gift of the Crown, but in these United States (concerning which it is intended more particularly to speak), it is a grant from the Sovereign People of each State, by and through their several legislatures, and sometimes—but rarely—from the Whole People, through their Federal representatives.

It has been said by some that the corporation itself is the source of all its powers. But while these statements appear contradictory, this objection disappears, together with the confusion of ideas from whence it sprung, when we note that after the corporation has

been created by the legislature and given life and has been sent forth upon its course, it exists of itself as a distinct, self-contained and separate entity, and may go on without aid or assistance *dehors* itself, to perform the acts and accomplish the purposes of its creation, *sui juris*. Thus, by the gift of the People, through the delegated power of the legislature, the corporation does become the source of its own power, to the extent and within the limitations of its chartered rights. And here it is proper to state what it is necessary to keep in mind when contemplating corporate rights and powers, namely, that in the Federal Government and in the various States, and, in fact, in all popular governments, the People are extremely tenacious of their rights and powers, and that they relinquish or delegate them to others only so far as the exigencies of government and the welfare and prosperity of the commonwealth demand; ever and always retaining and reserving to themselves, with jealous care and insistence, every other power and right.

The truth of the foregoing makes it evident that our representative bodies, both State and Federal, have, strictly speaking, no inherent powers to change basic rights: In fine, they possess no powers but those expressly conferred upon them by the People—including, of course, all such incidental powers as necessarily accompany those specifically named and conferred.

If, as has sometimes occurred, the welfare of the State or Federal Government requires the exercise and



use of some of these reserved powers, the People themselves must be confronted with the situation.

Being thus appealed to, they must say specifically whether such powers shall or shall not be exercised, or they may otherwise determine the matter.

Representative bodies accordingly have, strictly speaking, no inherent powers, nor any powers except such as originate in, and come to them through, the free will of the People.

This is the only theory which satisfactorily explains the origin of our system of jurisprudence, including that branch constituting Corporation Law, and is at the same time in strict conformity with the spirit and genius of a government of, for and by the sovereign People.

Thus we see that when a corporation is created, either by a specially granted charter or by virtue of and pursuant to a general incorporation law, the corporation can only possess such powers, rights, privileges and immunities as the creating legislature gave, and which it had the right and power to give. To enumerate in detail and define all the powers, rights, privileges and immunities which corporations may receive from the People, and may exercise and enjoy, would be beyond the limit and scope of this work; they will, however, be noted here in a general way, while certain of them, because of the great amount of litigation past, present and prospective in which they are important elements, will be dwelt upon somewhat *in extenso* at a later place. (See Chapters V., VIII., IX.)

**Enumeration of principal powers.**—In the textbooks we find that the powers of corporations in general are stated to be:

- (a) To act as an artificial person.
- (b) To continue in succession.
- (c) To have a distinctive name.
- (d) To have a common seal—as authentication of acts done.
- (e) To make contracts and be bound thereby.
- (f) To buy and sell property.
- (g) To sue and be sued.
- (h) To make and ordain by-laws for the government of corporate affairs.

There are also, as stated above, divers and sundry other powers and rights which require more than general remark and will be treated of in separate chapters, especially the right and power to sell or otherwise dispose of the entire corporate property and assets; also the right and power to issue bonds and secure payment thereof by mortgage upon such property; also the right and power to combine, consolidate, merge or amalgamate the corporation, its property and privileges, with other corporations, with or without the stockholders' consent, and to dissolve and terminate the corporate existence, in the absence of such consent or otherwise. These, as has been said, have been the subject of extensive litigation, and extracts from certain leading cases will be found below in later chapters.

In one of the earlier cases, Judge Locke, of the North Carolina Supreme Court, thus enumerates the powers of corporations:

"1st. To have perpetual succession; and therefore all aggregate corporations have, necessarily, the power of electing members in the room of those who die, to sue and be sued, and to do all other acts as natural persons.

"2d. To purchase lands and hold them for the benefit of themselves and successors.

\* \* \* \* \*

"4th. To have a common seal.

"5th. To make by-laws for the better government of the corporation. These corporations cannot commit crimes, although the members may in their individual capacity; the duties of these bodies consist in acting up to the design for which they were instituted."

\* \* \* \* \*

Trustees of University of North Carolina vs. Foy, etc.,  
1 Murphy's (N. C.) Reports, 58.

**Extent of powers.**—The powers of a corporation are thus defined by Chief Justice Black, of the Pennsylvania Supreme Court. That learned and distinguished jurist said:

"That which a company is authorized to do by its act of incorporation it may do; beyond that its acts are illegal, and the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. \* \* \*"  
Commonwealth vs. Erie & N. E. Railway Co., 27  
Penn. St., 351.

**Powers by implication.**—It is also to be noted that there are certain powers and rights which, though not

specifically named, yet pass to the corporation, such as the power to make by-laws, to use a common seal, and the like, without which the corporation could not properly exist and carry out its purposes; these are the incidental powers included in the term "Implications," used by the learned chief justice:

"\* \* \* If you assert that a corporation had certain privileges, show us the word of the legislature conferring them; failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively against the corporation. \* \* \* All our predecessors on the bench occupied the same ground, the same is occupied by the Supreme Court of the United States and many of the States of the Union; even in England the justice and necessity of it are universally acknowledged and acted upon. \* \* \* The lawyer who is not familiar with the numerous authorities upon it to be found in every book of reports will probably never become so; and the citizen who does not believe it to be a most salutary feature of our jurisprudence can hardly be convinced, though one rose from the dead.

"\* \* \* The defendant can take nothing from our hands by construction. We cannot widen the limit set to these principles, because they found them inconveniently narrow."

Commonwealth vs. Erie & N. E. Railway Co., *supra*.

To the same effect was the opinion of Mr. Justice Mercur, of the same court, who said of the corporation:

"It can exercise no powers or authorities except such as are conferred or authorized by its charter, or those necessarily incident to the powers and authorities thus granted, and, in estimation of law, part of the same." *Diligent Fire Ins. Co. vs. Commonwealth*, 75 Penn. St., 291, 295.

In Maine the rule was laid down regarding these (so-called) "Powers by Implication":

"That although a corporation might do those things which were incidental to the powers expressly granted, they could not do things expressly prohibited by law." *Plummer vs. Penobscot Lumbering Co. Ass'n*, 67 Maine, 363.

In North Carolina Chief Justice Pearson held:

"That general words in an act of incorporation do not authorize the company to do acts which by the public law are indictable; plain and positive words are necessary to confer such a privilege."

*State vs. Krebs et al.*, 64 N. C., 604.

In Texas, in a celebrated case,

*Waterbury vs. City of Lored*, 60 Texas, 519, Mr. Commissioner of Appeals Watts, in delivering the opinion of the Court, quoted from

*Green's Brice's Ultra Vires*, p. 28,  
and also from

Judge Cooley's *Constitutional Limitations*:

"Corporations have an implied power to make such contracts as are usual and necessary for carrying into effect the purposes for which they were created."



A case of great importance, and one of the highest authority, was

People ex Rel, Attorney General vs. Utica Ins. Co.,  
15th Johnson's Reports (N. Y.), 357.

This is one of the most cited cases of New York State. Opinions were written by Thompson, Ch. J., and Ambrose Spencer, J. Martin van Buren was, at that time, Attorney General of New York State, and took an active part in the trial. The holding of the case was, that a corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers thus expressly conferred.

In the United States Supreme Court, in  
Green Bay vs. Union Steamboat Co., 107 U. S., 98,  
100,

Mr. Justice Gray, who delivered the opinion of the Court, said:

"The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of the powers."

And again:

"We take the general doctrine to be, in this country, that although there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer."

See also, Thomas vs. Railroad Co., 101 U. S., 71,  
82 (1879);

opinion by Mr. Justice Miller.

In the leading English case of  
East Anglian Ry. Co. vs. The Eastern Counties Ry.  
Co., 11 C. B. (old series), 775, 809,

it was held that a railway company, incorporated by act of Parliament, could not, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign to those for which it was incorporated: *Vide* opinion by Jervis, Ch. J., Maule, Williams and Talfourd, J. J. The learned chief justice, in support of his opinion, cited

Salomon vs. Laing, 12 Beavan, 339, 352,  
and

Bagslow vs. The Eastern Union Ry. Co., 2 McNaght  
& G., 389.

The foregoing case had in it the element of being a "public" corporation, and in this connection it must be noted that in all public or *quasi*-public corporations there are certain duties and obligations which they owe to the general public in addition to those which they owe to their parent State and their shareholders.

In the very able and much cited work of Angel and Ames we find the following enumeration of corporate powers:

"To enable it to answer the purposes of its creation, every aggregate corporation has, incidentally, at common law, a right to take, hold and transmit in succes-

sion, property, real and personal, to an unlimited extent or amount."

Angel and Ames on Corporations, sec. 145.

To these common-law rights and powers there is to be added those incidental rights and powers—those passing by implication and hereinafter spoken of. It is also to be noted that the legislatures have in all our various States, to a greater or lesser degree, limited these common law rights.

Clark and Marshall say that one of these implied powers, or as they are sometimes termed, "incidental" powers, is the right "to use a common seal," though it is now well settled that corporations may contract by resolution, or by its agents, without a seal.

Clark and Marshall, sec. 12. Thomas vs. Dakin, *supra*, p.

**Limitations of powers.** — In Thompson's Commentaries it is thus stated:

"Judicial decisions abound in general statements of doctrine to the effect that corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted, and some add the proposition that these powers can only be exercised for the purposes contemplated by their charters."

Thompson's Commentaries on the Law of Corporations, Vol. IV., sec. 5638.

That able writer then cites among various cases herein noted the opinion of Chief Justice Marshall in Dartmouth College case, in connection with these words of comment:

"It has been thought necessary to define a portion of this definition, and accordingly it has been said that an incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it."

Citing Hood vs. N. Y., etc., R. R. Co., 22 Conn., 16 and 502.

Mr. Spelling, in his admirable work on corporations, says, in regard to the powers of a corporation:

"Being a mere creature of law, it possesses only those powers which are given to it by its charter, either expressly or by implication, as necessary and incident to a due performance of its duties, the exercise of its privileges and, furthermore, of the objects of its creation. The enumeration of the powers in a charter confers those that are fairly implied; but such enumeration of powers excludes all others than those that are included upon a fair and reasonable construction."

Spelling on Corporations, sec. 61.

It will be seen from the text-books and decisions that in no case does the ancient maxim — *Expressio unius est exclusio alterius*, more aptly apply than in matter pertaining to the powers of corporations.

Kyd, on the subject of the "Powers of Corporations," says that:

"A corporation may regulate in a reasonable manner the exercise of a right in its internal affairs, in the conduct of its members, or the mode by which a person is admitted to the exercise of a right, but it cannot take away a right."

Kyd on Corporations, Vol. II., p. 107 (London Edition, 1795).

It is probable that the learned author did not have in his mind such an institution as the modern private business corporation; yet the quotation is valuable and appropriate in that it declares the doctrine that it is not within the power of a corporation to deprive a stockholder of well-established vested rights.

The North Carolina case, *State vs. Krebs*, *supra* (64 N. C., 604) strongly sustains the ancient and well-known rule contained in the Bill of Rights, viz.:

"That no freeman ought to be taken, imprisoned, or disseized of his liberty, or privileges, or outlawed, or in any manner destroyed of his life, liberty or property, but by the law of the land,"—holding in substance that the "law of the land" means due legal process, and applying those principles to corporate affairs.

Moreover, in regard to the powers of corporations, there is still another principle which pertains to majority stockholders as well, namely: That notwithstanding however broad and extensive the powers may be which are conferred upon corporations, stockhold-



ers, their officers and agents, none of them can assume a power which impairs the obligation of a contract, or that deprives a person of a vested right, without the consent of the parties interested.

Nor can such corporation's stockholders, officers and agents exercise the powers conferred upon them for different purposes and objects than those for which they were granted; nor under cover or color of the powers which they undoubtedly possess, so exercise them as to constitute an utter and sweeping diversion from the original purpose, or as was said in the famous Dartmouth College case, *supra*, "totally change a system." These words were used by Chief Justice Marshall in his holding: "That the legislature could not totally change a system which has anteriorly been agreed upon by the corporators." This case will be quoted hereafter (Chapter XXIII.; see also Chapter XXIV. for Constitutional delimitation).

A body corporate can only act in the mode prescribed by the law of its creation.

Beatty vs. Marine Ins. Co., 2d Johns (N. Y.), 109.

In the celebrated and much quoted English case in the House of Lords,

Atty. Gen. vs. Great Eastern Ry., Reported in Vol. V., App. Cases, 473, 478,

opinion by the Lord Chancellor, Lord Selborne, it was held in substance that the doctrine of *Ultra Vires* was to be maintained, but was to be applied reasonably; so that whatever is fairly incidental to those things which have been authorized by an act of Parliament

ought not (unless expressly prohibited) to be held as *ultra vires*.

In the same case Lord Blackburn said :

“That where there is an act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliably authorize is to be taken to be prohibited.”

\* \* \* \* \*

“I quite agree with what Lord Justice James has said on this point, namely, as to prohibition :

“‘That those things which are incident to, and may reasonably and properly be done under the main purpose, though they be not literally within it, would not be prohibited.’”

Ibid, p. 481.

“A corporation is a creature of the law and derives all its powers from the act of incorporation. It is exactly what the act has made it, and is incapable of exerting any other faculties than those conferred by the act, or in any other manner than it authorizes. \* \* \* Every act must be construed in such a manner, if possible, as not to exceed the sovereignty of the legislature granting it; it ought not, therefore, to be deemed to authorize any act to exceed the jurisdictional power of the State, or interfere with the rights of other States.”

Opinion by Mr. Justice Bartol, in  
Mayor, etc., vs. Baltimore, etc., etc., 21 Maryland  
Rep., 50, 89, etc. (1863).

In  
Barry vs. Merchants' Ex. Co. and King., 1 Sandfords  
Chancery Rep. (N. Y.), 280 (1844).

the Assistant Vice-Chancellor set forth certain principles which have been the groundwork for many of the things subsequently laid down herein:

"Every corporation, as such, has the capacity to take and grant property, and to contract obligations in the same manner as an individual. This is the general rule; but corporations are usually created for some limited and specific purpose, and therefore the general powers incident to a body corporate at common law are restricted by the nature and object of the institution of each. And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law, or the provisions of its charter. Upon this principle, and to the extent stated, a corporation in order to attain its legitimate objects may deal precisely as an individual who seeks to accomplish the same ends."

The above-quoted decision was by the very able and learned Lewis H. Sandford.

Corporations are bound to follow strictly the letter of their charter, and can exercise no power unless

granted to them, or absolutely necessary to the power so granted.

Smith vs. Morse, 2 Cal., 524.

Power must be exercised in the manner pointed out by statute, etc.

Smith vs. Eureka Flour Mills Co., 6 Cal., 1.

Powers are only those specifically granted.

Neall vs. Hill, 16 Cal., 145. Argents vs. City of San Francisco, 16 Cal., 255.

The power of two States to concurrently create a single corporation is asserted in,

Bishop vs. Brainerd, 28 Conn., 299;

see also in this regard

Lane vs. Brainerd, 30 Conn., 565,

and

Platt vs. New York & Boston R. R. Co., 26 Conn., 567.

The ancient maxim, "*Sic utere tuo*," etc., is fully sustained in

Holmes, Booth & Hayden vs. Holmes, B. & A. Mfg. Co., 37 Conn., 293.

The above case was both leading and important, and the opinion of Mr. Justice Carpenter is well worthy of perusal. Among other things he said:

"Perpetuity is a prominent feature of corporations; ordinarily they are organized not for a lifetime merely, but for generations and perhaps centuries."

The same maxim is approved and held applicable to corporations, in

Hooker vs. N. H. & N. Co., *supra* (15 Conn., 317).

That corporations are to be treated like natural persons, so far as practicable, is laid down in *Smyrna, etc., S. S. Co. vs. Whilldin*, 4 *Herrington* (Del.), 230.

In this case Chief Justice Booth, in his charge to the jury, said, *inter alia*:

"Corporations are collections of individuals entitled to the same protection to property in their aggregate or corporate capacity as they would have in their individual capacity."

In Florida it has been established that—

"All powers of a corporation must be derived from some action of the legislative department of the government."

See, *State of Florida vs. Florida C. R. R. Co.*, 15 Fla., 690.

In Idaho, by a comparatively recent decision (1900), it was wisely held that the doctrine of *Ultra Vires* should not be applied when it would defeat the ends of justice, or work a legal wrong.

*Burke Land Co. vs. Wells, Fargo & Co.*, 7 Idaho, 42.

It is submitted that nowhere in the books is the true use of the *Ultra Vires* rule more forcibly expressed than in the foregoing utterance from one among the youngest of the States.

"A power which the law implies to corporations must be one which is necessary, suitable and proper to accomplish the object of the grant of express powers of a corporation, and one which is directly and



immediately appropriate to the execution of the specific powers, and not one which has but an indirect or remote relation to the specific purpose of the corporation."

*Ibid.*

People ex rel Moloney, Atty. Gen. vs. Pullman Palace Car Co., 175 Ill., 125.

People ex rel Peabody vs. Chicago Gas Trust Co., 130 Ill., 268.

In the above, Magruder, J., in his very able opinion (p. 284), quotes from "Boone on the Law of Corporations," as follows:

"Without a power specifically granted or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter.

"A corporation cannot lawfully divide its capital stock among its members, nor encroach upon capital so as to accelerate its own dissolution. But subject to these qualifications, every corporation has the free management of its property, save in so far as its freedom is controlled (1) by usage sufficient to impart implied condition in its charter, (2) by contract, express or implied, between the corporation and its members."

Kesson vs. Aberdeen, Wrights & Cooper's Incorporation, 36 Scottish Law Reporter, 38:

Opinion by Lord Kyllachy, Ordinary.

The above case was concerning a Scottish trading corporation. It sustains the general proposition that

no corporation can lawfully do anything contrary to its constitution as expressed in its charter.

"A corporation has no powers except such as are specifically granted or such as are incidentally necessary for the purpose of carrying into effect the express powers."

Wechler vs. First Nat. Bank, 42 Md., 581.

"The creation of the corporation was authorized by law, and upon its formation it became an artificial being, distinct from its corporators."

Sayers vs. Texas Land Co., 78 Texas, 247.

Corporations are not necessarily legally identical, because organized by the same persons and operated in the same interests.

White vs. Pecos Sand, etc., Co., 18 Texas Civ. App., 638.

The doctrine that a corporation once created by the State an "artificial person" is thereafter to be treated as a natural person (so far as practicable), asserted: Richmond F. & P. R. R. Co. vs. City of Richmond, 26 Grattan (Va.) 83, and *ibid*, p. 95.

Certain of the general powers of a corporation are thus defined in Virginia, in Rivanna Navigation Co. vs. Dawsons, 3 Grattan, 19: Opinion by Mr. Justice Baldwin:

"\* \* \* the general incidental powers of a corporation, whether derived from the common law or by statute, may be curtailed by the provisions of its legislative charter, either expressly or by necessary impli-

cation. \* \* \* Corporations aggregate are artificial beings created for specific and limited objects, public or private, in order to conduct and continue in succession the interests pertaining to these objects, by the exercise collectively of appropriate legitimate means, such as natural persons may employ individually. The difference between the forms of corporations and individuals is to be found mainly in the limited objects of the former, and the necessity of their acting in a concrete character. It is essential to corporations, as well as individuals, that they should have the capacity to sue and be sued, to make contracts, to acquire and alienate property. Without these powers the purposes of their institutions could not be accomplished. But they have not, like individuals, an unlimited discretion in the application of those powers. \* \* \*

In regard to the changing of capital stock, it was held:

“That corporations have not implied power to effect such change—that it can be effected only by legislative sanction—seems to be settled.”

Granger, etc., vs. Kamper, 73 Ala., 343,

Citing, Green’s Brice’s *Ultra Vires*, sec. 112, etc.

The headnote of Sec. 110, subdiv. 3, says:

“Joint stock corporations cannot have, apart from statutes, a power to vary the amount of their capital.”

In

Susquehanna Boom Co. vs. Dubois, 58 Penn. State,  
185,

Agnew, J., in delivering the opinion of the court, said:

“The rule that a power not clearly conferred must be deemed to be withheld is an admitted canon in the interpretation of private charters of incorporation.”

The doctrine hereinbefore laid down regarding the inherent powers of legislature applies *a fortiori* to their creation, to wit: Corporations; and it has been held in the U. S. Supreme Court that Ultra Vires acts are void, because of the legal incapacity of the corporation to originate or perform them.

See

Chicago, R. I., etc., Ry. Co. vs. Union Pacific Ry. Co.,  
47 Fed. R., 15;

opinion by Mr. Justice Brewer.

In connection with the general theme, and in furtherance thereof, it is necessary, and it is hoped, useful, to digress for a short time, while the application of these powers to the disposal of the corporate property, is seen and discussed in the next chapter.

## CHAPTER V.

## The Power to Alienate the Corporate Property and Rights.

Extent of power. — Right to exercise power. — Limitations of power. — Allied subjects. — Consensus of opinion.

**Extent of power.**—While the powers of corporations necessarily include the right to buy and sell, there has been serious discussion over the power of the corporation, its stockholders or officers to sell, alienate or otherwise dispose of its entire property, assets and effects, including its franchise. The limits of this book preclude a lengthy dissertation on this subject; an epitome even of all that has been written thereon cannot be given. There are, however, certain general rules governing the situation. These, taken together, constitute the key-note to all that which has been authoritatively said on the subject. From a statement of these the reader can deduce what the law is, for the principle of *stare decisis* is of far-reaching power and influence in all matters legal. Like amber, it conserves by permanent but transparent means the experience of other times.

**Right to exercise power.**—In Connecticut, Andrews, C. J., in delivering an unanimous opinion, said :



"It is competent for any business corporation, and especially one financially embarrassed, to sell its property, divide its assets or wind up its affairs."

Bartholomew vs. Derby Rubber Co., 69 Conn., 521.

The same opinion continues :

"We have considered this case on the assumption that the action of the directors and the majority stockholders was done in good faith and in the honest belief that they served the best interests of all concerned. If fraud had been charged, a very different case would have been presented. \* \* \* Fraud is never to be presumed. While fraud may in some cases be inferred from facts, it is never to be inferred unless it is charged; and then only when the facts and circumstances clearly indicate that fraud has been committed."

**Limitations of power.**—For a case of moment, wherein the whole subject was ably discussed, see

Forester vs. Boston and Montana, etc., Co., 21 Montana, 544 (1898);

opinion by Mr. Justice Pigot.

That litigation involved an appeal from an order granting an injunction restraining the defendant from voting, etc., any stocks in favor of disposing of the property of the said corporation, which was domiciled in Montana, to a corporation of the same name incorporated under the laws of New York.

Among other things, the court says:

"The defendants claim that the power so to transfer exists, while plaintiffs assert that the action intended to be taken is *ultra vires* the corporation, employing that term in its strict sense as designating acts which are beyond the powers of a majority, or of any number less than all of the stockholders as against the minority.

"At common law neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation, able to achieve the object of its creation, as against the dissent of a single stockholder. This doctrine is firmly established by authority of adjudged cases."

Citing, *Abbott vs. Am. Hard Rubber Co.*, 33 Barb. (N. Y.), 578. *People vs. Ballard*, *supra*,

and

Cook on Stock and Stockholders, sec. 667, etc.

The learned justice continues:

"Our attention is called to certain decisions which are said to recognize a contrary doctrine; but examination discloses no conflict of opinion among the various courts of last resort.

*Treadwell vs. Salisbury Mfg. Co.*, 7 Grey (Mass.), 393.

is typical of cases relied upon by the defendants; a short extract from the opinion (p. 405) will serve to illustrate the error into which counsel have fallen:

“‘Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders for the sale of the corporate property and the closing of the business of the corporation was justified by conditions of its affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable; under these circumstances it was in furtherance of the purposes of the corporation to pay their debts, close their affairs and settle with the stockholders on terms most advantageous to them.’

“In that case, as in every one cited by the defendants, the corporation was unable to further prosecute the purposes for which it was created. \* \* \*

“It must be admitted that the sale of the assets and the distribution of the proceeds is vitally different from the enforced change of those assets for the capital stock of a foreign corporation. \* \* \*

“In exercising the power of sale, which the defendants claim is conferred by the statutes, it would be necessary for those in control of the corporation to act with a due regard for the interests of all the stockholders, and to pursue such a course as would insure the accomplishment of the best result attainable; and if those holding a majority of the stock should not only determine that the entire assets of the company should be sold, but should adopt and direct such method of procedure as would prevent competition or in any other way involve sacrifice of the corporate assets or

endanger the interests of any of the stockholders, such proceeding should be checked and controlled by the courts, as both the management and the winding up of the corporation may properly be regarded as the performance of a trust, with which the property is charged for the benefit of all who are entitled to share in division of the profits, or in the distribution of the assets."

In

Williamette vs. Bank of British Columbia, 119 U. S.,  
191 (1886),

Mr. Justice Miller said:

"There seems to be here no limitation upon the power of the corporation to dispose of whatever it acquired under the statute which called it into being.

"\* \* \* It would be unprofitable to go into an inquiry of how far the corporation could have transferred these exclusive rights and privileges to anybody else, and how far it could have divested itself of them and its power to use them, if no such language had been in the charter. But the supreme legislative power which had the right to make this corporation, and to which it would be subject, more or less, in its exercise of powers conferred upon it, has also said, as it had a right to say, that it may sell these privileges, may part with them and may transfer them to other persons. \* \* \*"

In

Clark and Marshall

the subject is thus treated:

"A purely private business corporation may certainly sell and convey absolutely the whole of its property when the exigencies of business require it to do so, or when it can no longer profitably continue its business, and this may be done according to the weight of the authorities by the majority against the protest of a dissentient minority."

Clark and Marshall on Private Corporations, Vol. I.,  
p. 436, sec. 160.

And this principle, as laid down by Messrs. Clark and Marshall, is sustained by numerous authorities. In substance, the dissenting stockholder may prevent a sale of all the corporate property, by the directors or majority stockholders, where the corporation is a solvent, going concern, and where a dissolution is in view.

Cook on Corporations, sec. 689.

But where the by-laws permit such entire sale it may be done by a majority vote.

Ibid, sec. 670.

This doctrine does not preclude a sale where the business was not prosperous, or was not a so-called "going" concern; for where business exigencies require it the whole property, franchise and all, may be sold, even against the dissent of stockholders, one or more.

Sewell vs. East Cape May Beach Co., 50 N. J. Eq.,

717.

People vs. Ballard, 134 N. Y., 269, a leading case on the subject.



It is held in the last mentioned decision that a corporation cannot sell its property to a foreign corporation, organized through its procurement with a majority of non-resident trustees for the purpose of taking its place and its assets and carrying on its business, as this is a practical dissolution of the corporation.

Citing, as a leading authority:

Abbott vs. Am. Hard Rubber Co., 33 Barb. (N. Y.),  
578.

**Allied subjects.**—This subject of the power of the corporation to alienate property is connected closely and inseparably with the powers of the stockholders, of the directors and of the charter or its equivalent, the modern certificate of incorporation under general laws, and has elsewhere received attention: Vide Chapters IV., VIII., IX., and the text generally.

**Consensus of opinion.**—The consensus of authority is that whatever may be the common law power vested in a corporation to sell all the property and assets belonging to it, neither the corporation, its directors nor the majority stockholders have the right against the will of any stockholder to sell, dispose of absolutely or transfer away the entire assets and property of a prosperous, "going" business corporation.

## CHAPTER VI.

## Bonds and Mortgages.

Use and convenience of such securities. — Underlying idea. — Limitation of rule, when applied to quasi-public corporations. — General principle asserted in a leading case. — Other controlling authorities.

Use and convenience of such securities.—In addition to the means of procuring capital, which the stock affords, there is the opportunity which comes through the medium of bonds secured by mortgage upon the corporate assets. As an incident of the latter method of securing additional property or funds, it may be mentioned that in this way there is opened to numerous small investors a convenient channel for obtaining a reasonable return for the use of their capital or savings, with a smaller degree of risk than is usually attendant upon commercial and business ventures. As has been seen, in the presence of honesty and good faith, the tendency of the courts has always been to validate and sustain these instruments, for public policy and the prosperity of the commonwealth demand it.

The question of the power to issue bonds for money and secure the same by mortgage is an extensive one.

In most, if not all, the States special laws have been enacted regulating the creation of mortgages and of

corporate bonds. It is not within the scope of this work to go into details concerning these rules and regulations as they govern the matter in the various States, or to do more herein than to state the general rules and principles applicable thereto, as laid down by eminent jurists.

In the absence of legislative restriction, as will hereafter be seen, the private business corporation has the right to mortgage as well as to sell corporate property.

**Underlying idea.** — The great basic principles which underly all corporate action are: (1) That it exists, and alone exists, for the purposes for which the sovereign people uttered the creative fiat. (2) That whatever is necessary and proper for the purposes and objects of the corporation may be done, providing it is *intra vires*, and is done in good faith.

The common-law right of corporations to contract debts implies the right to issue evidence of indebtedness and to secure the same by mortgage upon the corporate property. And a fair construction of an act authorizing corporations formed thereunder to borrow money for the purpose of constructing their works, and to issue bonds in payment, permits a corporation to purchase works already constructed to its hand.

This right to mortgage is subject only to the condition that the contract is one the performance of which, from the nature and objects of incorporation, the corporate body is expressly or impliedly authorized and empowered to make. If the indebtedness con-

tracted and the mortgage given to secure the same be in excess of the powers of the corporation, that is, not necessary to the accomplishment of the objects for which it is formed, it is *ultra vires*; but even in that case the corporation would generally be estopped from setting up the invalidity of the mortgage, to defeat the rights under it of a *bona fide* holder for value.

**Limitation of rule, when applied to quasi-public corporations.** — Such is the well-established rule with respect to all ordinary private corporations, organized and conducted for profit. In the case of those corporations whose business largely concern public interests, a somewhat different rule prevails. It only extends, however, to those properties, the alienation of which would disable them from performing duties which they owe to the public.

They have the same right to dispose of and encumber property not essential to the exercise of public functions as have other private corporations. For instance, lands of a railroad company not acquired in the exercise of the right of eminent domain or so connected with the franchise to operate and manage a railroad, that the alienation would tend to disable the corporation from performing the public duties imposed upon it, and in consideration of which its charter privileges have been conferred, may be conveyed or mortgaged with like effect, as if owned and conveyed by any other private corporation under the general common-law right independently of special statutory authority.

If a corporation include in the same mortgages property which it may legally mortgage and other property which it cannot so encumber, the mortgage, in accordance with a familiar principle, will be held valid with respect to the first and voidable as to the second, provided the good and bad parts be capable of separation.

General principle asserted in a leading case.—In Jones vs. Guaranty and Indemnity Co., 101 U. S., 622, 625-628,

Mr. Justice Swayne, in delivering the opinion of the court, said :

“At the common law every corporation had, as incident to its existence, the power to acquire, hold and convey real estate, except so far as it was restrained by its charter or by act of Parliament. This comprehensive capacity included also personal effects of every kind.

“The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts.”

(Citing, 1 Kyd on Corporations, secs. 69, 76, 78, 108 (London, 1893. Angel and Ames on Corporations, sec. 145 (Boston, 1875). 2 Kents Commentaries, p. 325 (Boston, 1858). Reynolds vs. Commissioners of Stork County, 5 Ohio, 204. White Water Valley Canal Co. vs. Vallette, 21 How. (U. S.), 414).



"It is believed they are held valid throughout the United States, except where forbidden by the local law.

"The statute under which the Oil Company came into existence made it 'capable in law of purchasing, holding and conveying any real and personal estate, whenever necessary to enable' it to carry on its business; but it was forbidden to 'mortgage the same or give any lien thereon.' This disability was removed by the latter act of 1864, which expressly conferred the power before withheld. This change was remedial and the clause which gave it to us is, therefore, to be construed liberally with reference to the ends in view.

"The learned counsel for the appellant insisted that a mortgage could be completely given by the Oil Company only to secure a debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute, but not within its letter, or within the letter and yet not within the statute. The intent of the lawmaker is the law."

(Citing, *People ex rel. Atty. Genl. vs. Utica Ins. Co.*,  
15 Johns (N. Y.), 357,

and other cases).

"The view of the court in  
*Thompson vs. New York & Hudson River R. R. Co.*,  
3 Sandf. (N. Y.), Ch., 625,

was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose and bought

it. The purchase was held to be *intra vires* and valid. Here the object of the authorization is to enable the company to procure the means to carry on its business. Why should it be required to go into debt and then borrow, if it could—instead of borrowing in advance, and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these latter cases the ultimate result with respect to the security would be just the same as if the mortgage were given for a pre-existing debt in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of stockholders would apply with the same efficiency in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in these particulars would be the same whether the transaction took one form or the other. According to our construction the company could give no mortgage but one growing out of the business, and intended

to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

"Such securities are not contrary to the law or public policy of the State. Many cases are found in the reported adjudications where both judgments and mortgages have been sustained.

"Our view is not without support from the language of the statute, that every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate." If this mortgage had been given by individuals the question we are examining doubtless would not have been brought before us for consideration.

"When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity.

(Citing, *Sumner vs. Hicks*, 2 Black (U. S.), 532.)

"It is not necessary to go through the form of executing a second deed to take the place of the first one.

"This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.

"The statute of 1864 neither expressly forbids nor declares void mortgages for future advances.

"If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but

the State. As to all other parties, it must be held valid, and may be enforced accordingly.

(Citing, *Silver Lake Bank vs. North*, 4 Johns. (N. Y.), Ch., 370; *National Bank vs. Matthews*, 98 U. S., 621.)

"In the latter case this subject was fully examined. A corporation can act only by its agents. If there were any such technical defect as it is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor.

"No one else can raise the question. All other parties are concluded.

(Citing, *Gordon vs. Preston*, 1 Watts (Pa.), 385.)

"Where money had been obtained by a corporation upon its securities which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of stockholders, the company and shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company."

In re *Cook vs. Youghal Ry. Co.*, L.R., 4 Ch. App., 748.

**Other controlling authorities.**—The old rule, that "a corporation has the inherent power to issue bonds for the payment of money," is laid down in

*Cook on Corporations*, sec. 762,  
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supported by numerous cases.

It must have appeared from what has gone before, and, indeed, from the very nature of things, that without such power every business corporation might at times be seriously hampered in the accomplishment of its legitimate purpose, or be altogether destroyed.

It is stated in the same work — Cook on Corporations, sec. 778 — that the earlier corporations were carried on by the capital furnished by the stockholders, but those of later date by that furnished by mortgage-bondholders.

As a general rule, bonds issued by a corporation for the purpose of procuring loans and made payable to bearer are negotiable; but when such instruments contain special stipulations, and their payment is subject to contingencies not within the control of the holders, they are deprived thereby of the character of negotiable instruments, and are subject, in the hands of a transferee, to any defense existing thereto that would be available if they were still held by the original payee.

McClelland vs. N. S. R. R. Co., 110 N. Y., 469.

See

Spelling on Corporations, sec. 63,  
*sub capite*, "Incidental Powers," as set forth in the words following:

"All such incidental powers are applied as are necessary to carry out and exercise those expressly granted. The charter of a corporation need not be consulted for authority to sell and mortgage its prop-

erty. It may exercise its common-law right in these matters like an individual.

“Unless restrained by their charters they have implied power to mortgage their property to secure repayment of borrowed money or other debts, to secure further advances, to become parties to negotiable paper in the transaction of their legitimate business, to deal precisely as individuals seeking to accomplish the same end, to make all contracts that are necessary and usual in the cases of the business transacted or as a means of the accomplishment of legitimate objects.”

The citations sustaining the above are numerous.

## CHAPTER VII.

## The Duties, Obligations and Liabilities of Corporations.

Differing types of corporations imply different duties, etc. — Beginning and scope of these incidents to corporate existence. — Enumeration. — Principles applied.

Differing types of corporations imply different duties, etc.—There is a marked distinction between a purely business corporation and one of a public or *quasi*-public nature, and this difference will be found often noted in the books.

Its propriety becomes obvious when it is remembered that in the affairs of such corporations as are of a public character, or partially so, the people have granted various special privileges of intrinsic value, such as “*eminent domain*,” and the like, and it is most appropriate that the corporation should owe to the people—its grantors—duties, obligations and liabilities commensurate therewith. In the case of purely private corporations, however, practically no public or private rights are given away or invaded, the gist of the grant being “*succession*” and “the right of several persons to act as one.” Such gifts belong to the class where “withholding does not enrich, nor giv-

ing impoverish"; consequently, following the natural corollary of the just and equitable principle, "to whom much is given, much will be required," the private business corporation is called upon to do but little in return.

The distinction is very clearly outlined by Chief Justice Church, as follows:

"The creation of a corporation to construct and operate a railroad is the exercise of sovereign power and includes the grant of important franchise; such corporations have power to exercise the right of eminent domain and various rights and privileges not possessed by natural persons, in return for which they are placed under obligations to perform certain duties to the public."

Abbott vs. Johnstown, etc., R. R. Co., 80 N. Y., 27-29.

**Beginning and scope of these incidents to corporate existence.**—A corporation does not exist until the acceptance of its charter. Constructively, the performance of the requisites of a general incorporation law amounts to such acceptance, and endows the association with a *de facto* charter.

A body corporate takes upon itself the duties and obligations pertaining to the situation; but, as has been seen, those of the private business corporation, to which alone attention is here given, are comparatively simple and few.

The liabilities are such as generally pertain to a natural person, since by the act of forming such cor-



porate body, the incorporators undertake that the fictitious body will perform all the duties incumbent upon a natural person under like circumstances.

In addition to this there is an obligation, expressed or implied, resting upon such corporate body to act *infra vires*, viz., strictly within its chartered rights.

Of the liabilities so incurred, the various rules and principles which are laid down regarding the internal affairs of the corporation will be fully treated of hereafter; the liabilities of the corporation in its attitude toward and its dealings with the State and with other artificial or real persons, are alone spoken of here.

**Enumeration.**—An enumeration of the liabilities, as discussed in the books, is as follows:

*First.*—The liability of the corporation for the acts of its representatives, officers and agents. This comes under the head of "Directors, Officers and Agents," Chap. XIV., and is there treated, as well as in numerous places throughout the general text.

*Second.*—The liability for crimes and tortious acts. This obligation flows from the well-recognized principle that there is no immunity from crime, nor is there ever given authority to perform acts tortious *per se*, nor can there be.

If there is power to commit crime or do things *malum per se*, there must, of course, be liability therefor. The true doctrine, which is fully sustained by competent authority, is that a corporation, being a created person, though "artificial," is as liable as a

“natural” person, and the reason is obvious. Having received the benefits and advantages of being created an artificial person, the corporation is to be governed by the same rules and amenable to the same laws as a natural person, so far as its artificiality permits.

**Principles applied.** — A leading case, sustaining the proposition that the corporation is thus liable, and in derogation of the ancient and now exploded doctrine, that the corporation, by reason of its restricted powers, “can do no wrong,” has the following:

“Corporations are the creatures of the legislature, created for public and useful objects, and are often the only means of effecting those objects. Their charter and extent, their powers and immunities, as well as their duties and obligations, are just as the legislature pleases to make them; but when made, like natural persons, they are capable of making contracts, even with the power that creates them, or with subsequent legislatures, and their contracts when made are under the same protection as other contracts.”

State vs. Bank of Smyrna, 2d Houston’s Reps.,  
(Del.), 99.

Opinion by Chancellor Harrington.

In *Singer Mfg. Co. vs. Holdfodt*, 86 Ill., 454, the opinion of the court was by Ch. J. Schofield, who said:

“It is contested that appellant, being a corporation, cannot be made to respond in vindictive damages unless the wrongful act was authorized or approved by the corporation. This is not in accord-

ance with the ruling of this court. Ever since the decision in *St. Louis, A. & C. R. Co. vs. Dolby*, 19 Ill., 353, it has been regarded as settled law, that if the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages."

The question of corporate liability was clearly determined in the United States Supreme Court, in *Denver & Rio Grande Railway vs. Harris*, 122, U. S., 597, *et seq.* This case was of great importance; the opinion of the court was delivered by Mr. Justice Harlan. The learned justice said:

"In *Philadelphia, Wilm. B. R. R. vs. Quigley*, 21 How. U. S., 202, this court held that a railroad corporation was responsible for the publication, by them, of a libel in which the capacity and skill of a mechanic \* \* \* were falsely and maliciously disparaged and undervalued. \* \* \* The court upon a full review of the authorities held it to be the result of the cases, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances."

In *State vs. Morris & Essex Railroad*, 23 N. J. Law (2 Zabriskie), 369, it was well said that:

"If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now pretty well settled, contrary to the ancient authori-

ties, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. \* \* \* The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act."

See also, Salt Lake City vs. Hollister, 118 U. S., 256, 260;

New Jersey Steamboat Co. vs. Brockett, 121 U. S., 637;

National Bank vs. Graham, 100 U. S., 699, 702;

"Much has been said in the books concerning the 'old doctrine' and the 'new doctrine' of corporate liability for crimes and torts."

Am. & Eng. Encyp. (2d Ed.), Vol. VII, 824, 825.

A very intelligent idea of the subject can be obtained by reading Edwards vs. Union Bank of Florida, 1 Florida Supreme Court Rep., 158 (1845).

The principal question was "whether an action of trespass *vi et armis* doth lie against a corporation." After speaking with great erudition of the earlier authorities, the learned Chief Justice Douglass said *in his verbis*:

"In Riddle vs. The Proprietors of the Locks and Canals on the Merrimac River, 7 Mass., Reps., 186-8,

although an action for a nonfeasance, Parsons, chief justice, entered fully and very ably into this question and shows, upon the authority of Thealal himself, the principal reference of Viner and Comyn, that Thorpe's opinion, which has been so much relied on, had been overruled in England as to certain trespasses; and takes what we deem the true and correct distinction between corporations of a public nature, called *quasi*-corporations, such as towns, cities, etc., and proper corporations aggregate, by which is meant money and business corporations, against which the action may (and we think sound policy requires should), be maintained. \* \* \* In the case of Chestnut Hill, etc., Turnpike Co. vs. Rutter, 4 Serg. & Rawle (Pa.), Rep., 6, which was an action of trespass on the case for stopping a watercourse, it was strongly objected that a corporation could not be guilty of a tort; but Chief Justice Tillman said that this doctrine was fallacious in principle and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; \* \* \* 'there is no solid ground for a distinction between contracts and torts. \* \* \*'

"\* \* \* Angel and Ames on Corporations, 10th Am. Ed., pp. 224-226, is also authority to this point, and Chief Justice Marshall, in the case of Fowle vs. The Common Council of Alexandria, 3d Peter's Rep. 409, lays it down as settled 'that money corporations, or those carrying on business for themselves, are liable for torts'; not of particular description only, but torts generally committed by their agents.



"In the case of *John Whitemong's Ex. vs. The Wilmington & Susq. R. R. Co.*, 2 Harrington's Rep. (Del.), 514, it was held that 'trespass will lie against a corporation,' as in the case of *Dater vs. Troy Turnpike & R. R. Co.*, 2 Hills (N. Y.), Rep., 632, Cowen, Justice, said: 'The old doctrine was always admitted to be questionable (1 Kyd on Corporations, 223), that trespass or ejectment will not lie against a corporation—is exploded by modern authorities."

It was held in Missouri that a railroad company might become liable as a "joint tort-feasor."

*Ullman vs. Han. & St. Joe. R. R. Co.*, 67 Mo., 118.

In *Main vs. North Eastern Railroad Co.*, 12 Rich. Law (South Carolina), 82, Mr. Justice Whitner says:

"In the case of *Yarborough vs. Bank of England*, 16 East 6, Lord Ellenborough says the only question was whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort.

"By reference to Grant's 'treatise,' quite an array of cases are cited against railway companies, banks and other corporations, in case and in trover, in which actions have been sustained in English and American courts recognizing the principle generally that a corporation is liable in tort for the tortious act of their agents, thus placing the corporation in such respect very much on the same footing as individuals. \* \* \*"

The foregoing was the opinion of the whole bench.

The principle of corporate liability was upheld in *Michigan Bath vs. Caton*, 37 Mich., 199, the case

holding that where a trespass is committed by the subordinate employees of a corporation, the doctrine *respondeat superior* applies to the corporation, rather than to its agent in charge:

"A corporation, as is well established by the authorities, may be made responsible in an action on the case for a tort, and even in an action of trespass, if by its managers and authorized agents it commands the trespass to be committed or sanctions and approves the act when committed."

(Citing, 1 Chitty, 87.)

Underwood, etc., vs. The Newport Lyceum (5 B. Monroe), 44 Kentucky Rep., 130.

It is laid down in Addison on Torts, in substance, that a corporation may render itself liable for an action of tort, and may also be made responsible in an action for trespass. An action for a wrong lies against a corporation where the thing done is within the purpose of the corporation and has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual.

Vide Addison on Torts, sec. 114 (Am. Ed., Banks & Bros., 1891), Vol. I., 149, sec. 99 (old sec. 117).

The above work, subsequent to the section quoted, gives several other instances of corporate liability, principally among *quasi*-corporations.

It may be well to note that the learned author says:

"A corporation may become liable in damages for

the improper construction and management of dangerous premises and dangerous machinery."

Ibid, sec. 118 (old sec.).

But this is comprehended within the rule and doctrine which is now so thoroughly established, viz., that a corporation is liable as a natural person:

"It would seem to be settled by the authorities that trespass will lie against a corporation; and in reason and on principle if a man is injured by a tortious act of a corporation, done by its authority, he ought to have his remedy by action against them as much as against a natural person."

Lyman vs. The White River Bridge Co., 2d Aikins, Vermont Reps., 255; *vide* the very learned opinion of Mr. Justice Prentice in the above, citing,

The Chestnut Hill Turnpike Co. vs. Rutter, *supra*, and other governing cases. Also citing Chief Justice Parsons in

Riddle vs. The Proprietors of the Locks and Canals on Merrimac River, 7 Mass., 187,

wherein it was held that an action on the case would lie against an aggregate corporation for neglect of a corporate duty, etc., etc.

Ibid (notes).

As a résumé of what is hereinbefore contained on corporation torts, it may be well to add what is said in Brice's *Ultra Vires*, p. 430:

"\* \* \* It appears fully established in all the States (U. S.) that the liability of a corporation for

fraud is precisely analagous to that of a private individual, and the results are precisely the same.

“A corporation is everywhere liable for fraud, whether its own or that of its agents, as an ordinary citizen and is amenable to the same remedies, whether by action for damages, to avoid the agreements or to recover moneys paid.”

The note cites particularly and at length *Dobson vs. Pearce*, 12 N. Y., 156; *Desford vs. Walbridge*, 15 N. Y., 374; and *Sharp vs. Mayor of New York, etc.*, 40 Barb. (N. Y.), 256—a leading case.

## CHAPTER VIII.

### The Charter.

What the charter really is.—Some reference to original mode of creating corporations. — Evolution of modern mode of incorporation. — The charter a contract. — This basic principle important. — Authorities confirmatory of the foregoing doctrines.

What the charter really is.—This subject is of the greatest importance in matters corporate, because it affects every possible phase of corporate life.

To fully comprehend the subject and the sequent excerpts and citations, it is necessary to know what a charter really is.

And, first, it must be noted that there are three terms used in connection with the corporate charter, viz.:

*First.*—The “charter,” properly so called; an instrument by which, in these United States, the sovereign people, through their representative agents the legislature, by special grant and enactment, create bodies corporate and clothe them with divers and sundry rights, powers, privileges and immunities.

*Second.*—The “franchise”; which is not the charter, though often spoken of as such. Sometimes the term



is used to denote the corporation itself. It is in reality the right or privilege which the charter conveys to and bestows upon the corporation. Chancellor Kent says: "A corporation is a franchise possessed by one or more individuals who subsist as a body politic," etc., etc. See Kent's Commentaries, Lecture XXXIII., first paragraph. The word "franchise" is, however, sometimes used interchangeably with the word "charter," as in the Americanized Encyclopedia Britannica, under such head, where it is said—

"A franchise is a special privilege granted to an individual by the government, whereby rights are conferred which do not belong to the citizen by common right; a very common instance of such right is the franchise or charter granted by the State to certain persons, authorizing them to engage in business as a corporation."

The most approved idea, however, seems to be that the franchise is the right or privilege, and the charter the instrument by which this right and privilege is bestowed by the legislature upon the incorporators, and which creates the corporation and is the measure of its power.

*Third.*—The Certificate of Incorporation. This is a term which has been used since the enactment of general incorporation laws. It is, however, a misnomer; and the word is often a misleading one when confounded with the "stock certificate," which is the proper designation of a document whose purpose is to

serve as authentic evidence of ownership of shares of capital stock.

**Some reference to original mode of creating corporations.**—In order to dispel the fog of uncertainty surrounding the expression, it is necessary to go back to the time when all corporations were created by special enactment of the legislature and a charter in due and regular form was deemed an absolutely necessary prerequisite to corporate life and existence. (We purposely leave out the question of kingly prerogative, prescription and other matters which do not pertain to these United States.)

All corporate existence was, formerly, in the absence of general laws, based upon the possession of a charter, and a special petition to the legislature and its affirmative act were required in every case wherein a corporation was to be created.

In the granting of these charters it developed in time that favoritism often crept in, and in some States the question of such "special legislation" became a political issue.

**Evolution of modern mode of incorporation.**—As perfect equality before the law is the basis of our Government, the people, with well-advised insistence, demanded that in regard to this matter of corporate creation and in the granting of corporate rights, powers, privileges and immunities there should be absolute equality to all and favoritism to none, and that citizens (and sometimes citizens associated with oth-

ers) might, in the matter of corporate creation and endowment, obtain as an absolute right that which theretofore could only be had by petition to the legislature. Furthermore, the people through their legislatures were also impelled to substitute the creation of corporations by general statutes in the stead of special legislative grant. The imperative need of securing the benefits which accrue to business and commerce from the aggregation of capital and the forestallation of death—advantages which are only to be had through the instrumentality of private business corporations—compelled the various States to modernize their procedure respecting the creation and organization of such companies, with the result that general incorporation laws were everywhere enacted.

These laws, although varying in many ways in the different States, and though often changed, modified, amended or superseded by other acts or laws of similar nature, nevertheless have substantially the same features; and the spirit of all these laws and the intent and purpose of the various legislatures in enacting them has invariably been to create such a substitute for the specially granted charter as would fill the same place by accomplishing the same useful purpose. When this truth is fully realized it must certainly appear that, notwithstanding technicalities and specious definitions, the instrument, which is either an evidence of the performance of all the formalities required by the incorporation law or a declaration of the intent and purpose of the incorporators to avail themselves of

the benefits of the act—whether it be a “certificate” or a “declaration,” or whether it partakes of the nature of both—is, when read and construed in connection with the law, practically the same thing as a charter, because it is the legally provided substitute therefor; and this view of the matter appears to be sustained by the preponderating weight of authority, as will be seen from the extracts hereinafter set forth.

**The charter a contract.**—The charter of a corporation, whatever its name and however conferred, is neither more nor less than a contract by and between the sovereign creating power as the party of one part and the aggregation of persons forming the corporation and their successors, the party of the other part: Wherein and whereby the creating party, the State, grants to the other party, the incorporators, within the limitations and restrictions of law, certain rights, powers, privileges and immunities; and not only so, but this contractual element extends beyond the creating power and the corporation, and exists not only between the corporation and its members, but between the corporation and the public, making, as it were, a *quasi*-tripartite agreement; and this comprehends not only the persons originally named, but all of those who may, shall or will succeed them. This contractual relation, moreover, is a part of the *res*, and clings to it ever and always through every varying state of circumstances.

**This basic principle important.**—The above rule has been in many different ways and in diverse phraseology

laid down and enunciated by the ablest jurists. With this principle in mind, many of the difficulties in the construction of charters and charter-laws (if the term is permissible), and of the laws in general, as applied to corporations, will disappear—it following as a natural and unavoidable sequence that the doctrines, principles and rules which govern contractual relations are to a great extent equally controlling in corporate affairs. It is an apothegm with the medical profession that “it is not so hard to cure the patient as it is difficult to diagnose the complaint”; so in the law,—if one well knows what rules and principles are applicable to a given case the appropriate remedies to enforce the right or to prevent the wrong are determined with comparative ease; thus, when this contractual relation is fully known and appreciated, and when it is seen that the courts have so applied the rules and principles of law to matters corporate, it becomes practicable for the trained lawyer to determine the situation, however complicated it may at first have appeared.

**Authorities confirmatory of the foregoing doctrines.**—“An act granting corporate privileges to a body of men is, when accepted, a contract between the State and the corporators. It is not worth while now to try whether this doctrine will stand the test of the original principles. It is sustained by everything that we are bound to regard as authority, by the decisions of all the courts in the country, by the opinion of the legal profession and by the general acquiescence of



the people. It is not denied by the defendant or his counsel, or anybody else who has attempted to sustain the action of the legislature in this case. Being a contract, it cannot be rescinded by the act of one party without the consent of the other. A grant of corporate privileges for a specified period cannot be resumed by the State within such period. If the charter be without limitation as to time it is forever irrevocable.

"It does not follow from this that corporations are beyond the reach of public control. When the privileges they enjoy are fraudulently abused, the courts may pronounce them forfeited. In some cases, also, the legislature, when granting the franchises, reserves to itself the right to revoke them. When the charter contains such a stipulation it is as much a part of the contract as anything else that is in it.

"The legislative repeal of such a charter bears no resemblance to the judgment of a court against the corporation on a *quo warranto*. They proceed upon principles as different as the functions of the legislature are different from those of the judiciary.

"If the power to repeal be reserved its exercise is merely carrying out the contract according to its terms; and the State is using her own rights, not forfeiting those of the company.

"The power to repeal is sometimes reserved absolutely, so that the franchises of the corporation may be revoked whenever the legislature may think proper. It is sometimes reserved conditionally, to be exercised only in case a certain event shall happen. The event

may be one which the corporators could not control, or it may be such a one as could not occur without some default of their own. In either case the charter is repealable when the event happens.

“In the charter now under consideration the following clause occurs: ‘If the said company abuse or misuse any of the privileges hereby granted the legislature may resume the rights granted to the said company.’ This was a reservation of the right to repeal the charter in case it should be violated. If it was violated, then the repeal was not breaking the bargain but keeping it; not impairing but enforcing the obligation of the contract. The plaintiff’s counsel insists that inasmuch as the right to repeal depended on matter of fact, the right could not be exercised until the fact was ascertained by a judicial trial. But if this were not a mistake the reservation would be nugatory. When the abuse of a charter is judicially ascertained the corporation will be dissolved without the intervention of the legislature, and the court could not decide the fact to be true without pronouncing the judgment a forfeiture.

“The legislature certainly meant to reserve something more than the right to dissolve the corporation after it shall be dissolved by the court. The power to kill what is already dead is no power at all. The argument of the plaintiffs on this point is altogether unsustained by authority. There are several cases directly against it. In *Crease vs. Babcock* (23 Pick, 234), the Supreme Court of Massachusetts said that when the leg-

islature reserved to itself the right to repeal a charter on the happening of a certain event they might enact the repeal whenever the event happened; it was not a reservation of judicial power. To the same effect is *McLarren vs. Pennington*, 1 Paige (N. Y.), 107; and in *Miners' Bank vs. United States* (11 Greene, 561), it was held not only that the fact on which the right of appeal depended might be noticed by the legislature without the assistance of the judiciary, but that its truth could never afterward be questioned by any court. Without intending to endorse the whole doctrine of the last mentioned case, we are very clear that the right to appeal vests in, and may be exercised by, the legislature whenever the event occurs upon which they stipulated for the right. If the corporators desire to contest the validity of the repealing act in a court they must at least prove that the event did not occur.

“The most important privilege and highest immunity which a corporation may enjoy is that of holding its franchise by a tenure above the reach of the law-making power which regulates everything else in the State. When this immunity is bestowed on certain conditions the conditions cannot be changed without changing the charter, and no such change can be made except by the express and plain words of the legislature. The corporation claims to hold the immunity, and for its title it points to a bill in equity filed by the attorney-general and to a decree of the Supreme Court and to its own act in removing the road. But the corporation

itself cannot add anything to the charter, nor can it do so even with the assistance of the executive and the judiciary. It still has no more than what the legislature gave it, and the legislature did not give it what it now claims.

“Another and still plainer view of the argument based on the law of estoppel may be taken. It is a familiar and well-established rule of constitutional law that the prohibition to impair the obligation of contracts is not applicable to an act of assembly, unless it violates directly some right secured by an existing contract, bargain or agreement. That provision does not protect from legislative interference other rights acquired or created in other ways. Here, now, is an Act of Assembly which enforces one of the stipulations of a contract between the State and a corporation. The corporators say to the legislature, ‘You shall not do the thing. We admit that your act is according to the very terms of our agreement; but certain facts and circumstances have occurred since which bind you in justice, equity and law to abstain from taking advantage of the agreement.’ The short and conclusive answer of the legislature is this: ‘To enforce a contract is not to impair it, and whatever the obligations may be which arise out of the subsequent facts, it is enough that they are not obligations of the contract.’

“A harder task cannot be imagined than that of proving the law before us to be void on the ground contended for. The argument would have been successful if there had been anything in the Constitution to for-

bid the carrying out of the contracts. It might not have been a failure if the obligation of contracts could be interpreted to mean all obligations of every kind, however created. And it would probably have been triumphant if counsel could have shown that the power which is given to the legislature by the Constitution is taken away by rules of court."

Erie etc., R. R. Co., vs. Carey, 26 Pa. St., 287-301-303. The opinion of the court was delivered by Mr. Justice Black.

"When a corporation is sought to be organized under the general law the declaration which the law requires to be signed and recorded is an acceptance by the corporators, under the name designated, and for the objects expressed, of the corporate powers and capacity the law confers. \* \* \* Of every corporation formed under the general law the law itself and not the declaration of incorporation or the constitution and by-laws adopted for government becomes the charter and enumerates the powers which are to be exercised and the nature and extent of the corporate franchises and privileges. \* \* \* It is apparent from an examination of the statute that the creation of corporations under general laws rather than by special legislative enactment was not intended to work any essential change in their nature or character. Whether deriving existence from a special law or from incorporation under the general law, the corporation is an artificial being of legislative creation, having no other powers or properties than such as the



law confers, or which may be incidental to their very existence. \* \* \* The office and the effect of the declaration the statutes do not leave in doubt when recorded, the persons signing it and their successors become a body corporate by the name stated therein and with the powers conferred by law. It is an acceptance, under the name designated, for the object expressed, of the corporate powers and capacity the law confers and a statement of the principal constituents of the corporation, the amount of the capital stock, the name of the stockholders and the quantity of interest each has in the capital stock. There is no authority of law for introducing more into it, and if more be introduced it is a mere surplusage, not adding to or detracting from the force of the declaration. A controlling purpose in authorizing or in compelling the creation of private corporations under general laws is to secure uniformity and equality of corporate powers, functions and privileges; that all corporations of the same class, formed for like purposes, should possess the same capacities and properties and exercise and enjoy the same franchises and privileges. Unless it was intended to work a radical change in the nature and character of these artificial beings, the mere creature of the law, and to subvert the whole theory which had prevailed in reference to them, it cannot have been contemplated that they should for themselves create power and privileges by declaration or reservation, whether the declaration is expressed in the articles of incorporation or in the constitution

and by-laws ordained by the corporators for their government; such declarations or reservations would soon become more liberal and diverse than was the liberality and diversity of the grants of power by special legislative enactment, the evil it was intended to remove. Of every corporation formed under the general law, the law itself becomes the charter, defines and enumerates the powers which are to be exercised, the nature and extent of the corporate franchises and privileges. The declaration of incorporation—the constitution and by-laws adopted by corporate government—do not define or enumerate the corporate powers. These are the acts of the corporators. The charter is the grant from the sovereign power of the State, and by that source only can be varied or enlarged. \* \* \*

“The power must be found in the law from which corporate existence is derived, or must have been conferred by a subsequent law, the provisions of which were observed in the exercise of the power.”

Grangers' Life, etc., Ins. Co. vs. Kamper, 73 Ala., 325. etc. (1882.)

The foregoing extract is from the opinion of Chief Justice Brickell, of the Alabama Supreme Court. The opinion is given thus *in extenso*, because of the able manner in which it elucidates the matter in hand.

In Pennsylvania it was thus decided:

“Under the law of 1791, where the instrument specifying the objects, articles, conditions and name of the association are approved by the attorney general

and the Supreme Court, and enrolled according to law, the persons associating become a corporation according to the objects, articles and conditions contained in the instrument. These become their charter and have the same force and effect in law as if they were specifically granted by special act."

Society, etc., etc., vs. Commonwealth ex rel Meyer, etc., etc., 52 Penn. State Reps., 125, 131.

The opinion of the court in this case was delivered by Justice Agnew; Woodward, Ch. J., dissented from the opinion in some points, but not from the principles above set forth.

"\* \* \* Having the force and effect of law by the provisions of the act allowing the incorporation, it stands upon a strictly legal foundation and is no longer a subject of judicial inquiry as to the fitness of its objects, conditions and articles."

Ibid.

The above case was concerning an eleemosynary corporation, yet sustains the general principle and doctrine.

In Nebraska it was said:

"In this State the legislature does not by a special act charter a corporation, but all corporations are formed under general laws and these laws and the articles of incorporation adopted in conformity with such laws constitute the charter of a corporation of this State."

Lincoln Shoe Mfg. Co. vs. Sheldon, 44 Nebraska Reps., 279.

In Michigan, in

Van Etten vs. Eaton, 19 Mich., 187,

Mr. Justice Graves delivered the unanimous opinion of the court, saying (page 194):

“The organic act under which the corporation was formed, together with the articles of association, are to be considered as the charter of the company, and they are in the nature of a grant from the State to the corporators, expressing the rights and privileges conferred and the conditions annexed to them, and the deliberate acceptance of this grant, with the rights and privileges involved in it, is conclusive evidence in the civil proceedings authorized by section 23, of knowledge in the grantees or incorporators of all these conditions.”

Mr. Potter, late of the New York Supreme Court, in his able work on Corporations, thus defines the restrictive and controlling influence of the charter upon corporate acts:

“\* \* \* The by-laws of a corporation must not be inconsistent with the charter, for it is this instrument that creates it an artificial being, imparts to it its powers, designates its objects and usually prescribes its mode of operation. It is, in short, the fundamental law of the corporation; and in its terms and spirit it is a constitution to the petty legislature of the body acting by or under it. Hence all by-laws in contravention of it are void.”

Potter's Law of Corporations, Vol. I., p. 116, sec. 71.

it is as visible in the eye of the law as any other right whatever of which natural persons are capable; it is a right of such a nature that every member, separately considered, has a free hold in it, and all, jointly considered, have an inheritance which may go in succession. Natural persons, as such, are capable of taking and holding this right, which is not taken or held in their politic, but in their natural capacity; for many men, as men, are capable of union which, if it requires proof or illustration, is evident from the charters of creation, and the pleadings in all such cases in which it is said that the 'men and burgesses' or the 'men and citizens' are constituted one body corporate or politic. And as the natural persons essentially constitute the body politic, so all the operations and exercise of this right are performed only by the natural persons.

"When it is said that a corporation is immortal we are to understand nothing more than that it is capable of an indefinite duration, and the authorities cited to prove its immortality do not warrant the conclusion drawn from them. If a man gives lands, says Sir Edward Coke, to a mayor and commonalty or other body aggregate consisting of many persons capable, without naming successors, the law construes it to be a fee simple because, in judgment of law, they never die; where the sense is plain that these natural persons, though capable to take in their natural capacity jointly which the law would adjudge an estate for life, yet the grant being made to them in their corporate name, they take in that capacity, and the grant is not deter-



minable on the death of any of the individuals, but continues as long as the corporation continues.

"In support of this idea of the immortality of corporations a passage is also cited from Gratius, which, however, when fairly considered, is so far from justifying the conclusion drawn from it that it proceeds on the supposition that they may cease to exist.

"It has been said that a corporation aggregate has neither predecessor nor successor, an expression which probably arose from the comparison of a corporation with a natural body, with respect to its personal identity, which means nothing more than that all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law in the same manner as the river Thames is still the same river though the parts which compose it are continually changing."

Kyd on Corporations, Vol. I., p. 13, *et seq.* London Edition, 1793.

The franchise of a corporation is one thing, its property another and different thing; although the "franchise" may have a great money or intrinsic value.

"There is also to be noted a distinction between the grant of a franchise and a mere license, in that the former comes within the protection of the rule in the Dartmouth College case, while the latter is revocable at the pleasure of the grantor. Thus it is held that a supplement to a charter, which merely conveys a new right or enlarges an old one without imposing any

additional burden, is a mere license or promise by the State and may be revoked at pleasure”

Beach on Private Corporations, Vol. II., p. 39, etc.,  
sec. 21.

In *Wilmington R. R. vs. Reid*, 13 Wallace (80 U. S.), 264, we have the opinion of that great jurist, David Davis, of the United States Supreme Court, who says:

“It has been so often decided by this court that a charter of incorporation granted by a State creates a contract between the State and the corporators which the State cannot violate, that it would be a work of supererogation to repeat the reasons upon which the argument is founded.”

See also Bouvier's Institutes, as follows:

“Private corporations give a right to the corporators of which they cannot be deprived without their consent unless the act of corporation or charter reserves to the legislature the power to do so, and in this they differ from public or political corporations, because in the latter no vested right is violated by the change, and the legislature may at pleasure alter the provisions of their charter or constitution.”

Bouvier's Institutes, Vol. I., p. 42, sec. 184.

As is seen herein, the authorities show beyond dispute that the charter, or its equivalent, being contractual in its nature and the rights thereunder having become vested, the legislature cannot disturb the same in any case where such disturbance will impair the

obligations of a contract; so that the question of "vested rights" is necessarily involved in the discussion of charters. And in this connection it will be useful to set forth the very able and valuable elucidation of the subject of "vested rights" made by the learned and distinguished Mr. Justice Brown, of the United States Supreme Court, in a very important case of comparatively recent date:

"A vested right is defined by Fearne in his work upon contingent remainders as 'an immediate fixed right of present or future enjoyment,' and by Chancellor Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent's Coms., 202. It is said by Mr. Justice Cooley that 'rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person as a present interest; they are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event; they are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Cooley's Principles of Constitutional Law, 332."

Pearsall vs. Great Northern Ry., 161 U. S. R., 673.

The gravamen of this decision was the consolidation of railway corporations. Concerning "vested rights" generally see the subject considered in connection with

the Dartmouth College case at a later place—Chapter XXIII.

The opinion of Lewis, J. (1854) *McMasters vs. Reed's Executors*, 1st Grant's Cases, 47 (Pa.), contains the following:

"It is said sometimes that privileges not expressly granted in a charter are withheld."

Citing, *Bank of Pennsylvania vs. Commonwealth*, 7 Harris (Pa.), 144.

*Packer vs. Sunbury, etc., R. R. Co.*, 7 Harris (Pa.), 211.

"At other times it is declared that a corporation can exercise no power except those which the law confers upon it, or which are incident to its existence."

Citing, *Perrene vs. Chesapeake, etc., Canal Co.*, 9 Harvard (U. S.), 172, 184;

*Dartmouth College vs. Woodward*, 4 Wheat. (U. S.), 518, 636;

*Bank of Augusta vs. Earle*, 13 Pet. (U. S.), 519, 589;

*Rungen vs. Caster*, 14 Pet. (U. S.), 122, 129.

"These rules were applied to cases in which the corporations were claiming monopolies in conflict with the rights of the Government or its grantee, or were demanding exemption from their proper proportion of the public taxes. The rules were sufficient for the cases to which they were applied; but they are not stated with sufficient precision for general application, and they do not accurately express the true rule for

the decision of cases in which there is no conflict with the Government or its grantee, and where no privilege is claimed in derogation of the public rights. Corporations possess both power and privileges. These powers are often expressed in their charters; but they are frequently implied from the duties imposed. In the latter case they are but incidents to the principal matter and partake so much of its character that they ought to be denominated duties instead of privileges. A corporation may be clothed with power to perform its duty, to bear a burden, to pay a debt, or if unable to pay immediately, to give an obligation for it payable at a future day. But this power can scarcely be called a privilege which is to be grudgingly withheld, unless expressly granted by its charter. And any construction which would relieve corporations from these obligations would be inverting altogether the rule of strict construction and would, in fact, be conferring privileges of a character highly injurious to the public.

“The true rule applicable to the case now under consideration is given by Chancellor Kent in these words:

“‘The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other.’”

(2 Kent's Comm., sec. 298; see also sec. 299, Little, Brown & Co.'s Boston Ed., 1858.)



The learned Mr. Justice Lewis, in *MacMasters vs. Reed's Executors*, *supra*, continues:

"The Supreme Court of New York has adopted the same rule:

" 'A corporation for a specific object has no rights except such as are expressly granted and those that are necessary to carry into effect the powers granted. Many powers and capacities are tacitly annexed to a corporation duly created; but they are such only as are necessary to carry into effect the purposes for which it was established.'

(*People vs. Utica Ins. Co.*, 15 Johns (N. Y.), 383; *N. Y. Firemen's Ins. Co. vs. Sturges*, 2 Cowen (N. Y.), 675; *Same vs. Ely*, *id.*, 699.)

"Angel and Ames also announce the general rule to be that a corporation 'has power to make all such contracts as are necessary and usual in the course of business, as a means to enable it to attain the object for which it was created, and none other.'

(Angel and Ames on Corporations, 245.)

"And the Supreme Court of this State has distinctly adopted the rule that 'a corporation duly created has tacitly annexed to it, without any express provision, every capacity that is necessary to carry into effect the purpose for which it was established.' (*Dana vs. Bank of U. S.*, 5 Watts and S. (Pa.), 243.)

"In accordance with this principle it has been declared in a work of authority that 'in general an ex-

press authority is not indispensable to confer upon a corporation the right to borrow, to deal on credit, or become a drawer, endorser or acceptor of a bill of exchange, or to become a party to any negotiable paper.' Corporations are expressly mentioned in the statute of Anne, respecting promissory notes, as persons who may make and endorse negotiable notes and to whom such notes may be made payable.

(Angel and Ames on Corp., 234; Mott vs. Hicks, 1

Cow. (N. Y.), 513;

Kelley vs. Mayor of Brooklyn, 4 Hill (N. Y.), 265;

Moss vs. Oakley, 2 Id., 265;

Banker vs. Mechanics' Ins. Co., 3 Wend. (N. Y.), 97.)

"These authorities are full to the point. But it seems clear upon principle, as well as upon authority, that corporations are bound by all contracts, whether express or implied, whether by hand, bill of exchange or negotiable note, entered into in the usual and necessary course of their legitimate business, except where there is a statutory prohibition.

"The case of

Broughton vs. Manchester, etc., Waterworks, 3 Barn.

and Ald., 1,

is sometimes cited as an authority against this proposition, but it cannot be so regarded. There was a prohibition by statute in that case, and the decision was placed upon that ground.

"The charter of the Erie Canal Company contains the usual grant of corporate powers. The company is

expressly authorized to purchase, sell, mortgage and otherwise dispose of its real and personal estate, and to do all other things 'necessary for the proper business of the company.' What is 'the proper business of the company?' The completion of the canal and its preservation for the uses designated by law. It had, therefore, a right to enter into contracts for the work required for these objects. It was not usual, and quite unreasonable, to pay before the work was done. The company was, therefore, inevitably obliged to contract debts for these purposes. If unable to raise the money for immediate payment, honesty required that it should give satisfactory engagements to pay at a future period, with legal interest for the delay. The corporation was unable to borrow money to complete the work. It gave these obligations to its contractors in payment of debts contracted in 'its proper business.' They are binding upon it unless they fall within the meaning of some statutory prohibition."

The preceding pages are from

McMasters vs. Reed's Executors, cited *supra*.

In the Province of New Brunswick it is to be found that corporations are held to be as they were created, and have no inherent power of change. In

Lloyd vs. The E. & N. A. Ry. Co., 18 N. B. (2d P. and B.), 194,

it was held that "an incorporated company has no

power to change its corporate name without the authority of the legislature. \* \* \*"

Charlebois et al. vs. Delap et al., XXVI. Canada Sup.

<sup>1</sup> Ct. Reports, p. 221, etc. (1895),

was a leading case and involved the powers of corporations. The prevailing opinion was by King, J., in which, among other things, he said:

"A company incorporated for definite purposes has no power to pursue objects other than those expressed in the act or charter, or such as are reasonably incidental thereto."

## CHAPTER IX.

The Charter—(*Continued.*)

Extent and effect of contractual relation. — Legislative power to amend is limited by Constitution.

Extent and effect of contractual relation.—The rule of law laid down in the Dartmouth College case (see Chapter XXIII.) applies to contracts between corporations and their members as well as to those between corporations and the State, their creator.

“The relation between the stockholder and the corporation is one of contract.”

Clearwater vs. Meredith, 1 Wallace (U. S.), 25.

Beach on Private Corporations, Vol. I., p. 42, sec. 23.

The stockholder subjects his interest to the control of the proper corporate authorities to accomplish the object of the organization, but he does not agree that the purposes shall be changed in its character at the will of the directors, or even of a majority of the stockholders. The contract cannot be changed without the consent of both contracting parties.

Neither does the stockholder as an individual consent that the controlling interests shall pervert their powers or abuse their official knowledge of the corpo-



ration's affairs for a pecuniary or other advantage. What the legislature itself could not do (as will abundantly be shown hereafter), by way of amendment of the charter,—the directors or other officers, or the majority of the stockholders, or both in combination, cannot accomplish by deceit or indirection.

The doctrine of the essential unlawfulness of oppression by the majority of the board of directors or the majority of the stockholders, is especially important at the present time, and the subject will be found pervading the pages of this work in many places.

See particularly, Chapters XXII. to XXV., inclusive.

In

*Salt Co. vs. East Saginaw*, 80 U. S. (13th Wallace), 373, 378,

Bradley, J., delivering the opinion of the court, said:

“Charters granted to private corporations are held to be contracts; powers and privileges are conferred by the State and corresponding duties and obligations are assumed by the corporation, and if no right to alter or repeal is reserved, stipulations as to taxations, or as to any other matter within the power of the legislature, are binding.”

Corporate franchises granted to and accepted by private corporations are in the nature of legal estates and contracts within the obligation clause of the Constitution.

*The Pennsylvania College Cases*, 13 Wallace (U. S.), 190:

"It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the clause of the Constitution of the United States, that prohibits States from passing laws impairing the obligations of contracts."

Stone vs. Mississippi, etc., 101 U. S., 814.

Opinion of Mr. Chief Justice Waite.

"\* \* \* (Art. I, sec. 10.) The Doctrines of Trusts, Dartmouth College vs. Woodward (4 Wheaton [U. S.] 518), announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract there is nothing in the grant on which the Constitution can act."

Ibid.

As has been said, a charter is a contract, in the construction of which much has been said in the books. The general rules pertaining to contracts apply, though it is universally held that in construing public or *quasi*-public charters the version most favorable to the State must be adopted and applied.

See

State vs. Petway, 2 James (N. C.), 296,  
opinion by Judge Battles. Though this case referred

to a public corporation, yet it sustains the general rule and principle that charters and incorporation statutes confer nothing by implication beyond these "incidentals," which have been spoken of *supra*.

"Grants of franchises and exemptions in charters are construed strictly and most strongly in favor of the public and against the grant; the object being to protect the public against improvident grants made by implication without clear intention."

Waterman on the Law of Corporations, Vol. I., p. 493,  
sec. 138,

and cases cited.

An important and leading case in point is:

Commissioners of Indian Fisheries vs. Holyoke Water  
Power Co., 104 Mass., 446-451;

opinion by Mr. Justice Gray.

"As the constitution (State of Arkansas) expressly provided that the powers to amend might be exercised whenever in the opinion of the legislature the charter might be injurious to the citizens. \* \* \*

"The question, then, is whether the amendment should have been held unauthorized because amounting to a deprivation of property forbidden by the Federal Constitution. The power to amend cannot be used to take away any property already acquired under the operations of the charter or to deprive the corpo-

ration of the fruits already reduced to possession of contracts lawfully made."

Waite, Ch. J., in

Sinking Fund Cases, 99 U. S., 700.

"But any alteration or amendment may be made that will not defeat or substantially impair the object of the grant, or any rights which have vested under it and that the legislature may deem necessary, to secure that or other public or private rights."

Gray, J., in

Commissioners, etc., vs. Holyoke Water Power Co.,  
104 Mass., 446.

Greenwood vs. Freight, etc., 105 U. S., 13.

Spring V. vs. Schattler, 110 U. S., 347.

The foregoing and subsequent quotations show that the question of legislative power to alter or amend charters once granted, the weight of authority establishes the doctrine beyond doubt, viz.: That where the legislature of a State has given to a corporate body rights, it cannot, after the same have once vested, withdraw them, except in cases where such legislature has expressly reserved such power; and even then it may not so alter or amend, where the same, in derogation of the Federal Constitution, works a substantial impairment of contractual obligations by exceeding the confines of the power thus reserved.

People ex rel. Attorney General vs. Utica Ins. Co., 15  
Johns (N. Y.), 357, 358.

The very wise and learned Chief Justice Spencer therein said :

"If there are certain immunities and privileges in which the public have an interest as contra-distinguished from private rights, and which cannot be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises. \* \* \* All the elementary writers in adopting Finch's definition of a franchise join that it is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject."

To citizens of a republic the idea of sovereignty is absolutely and entirely included in the powers of the "People," who, acting collectively within proper constitutional bounds, have every power and all the practical elements of sovereignty.

"When the words used in a charter of a corporation defining its powers have a common and well-understood meaning and are free from ambiguity and doubt, they may not be enlarged so as to embrace other subjects, by or in view of the tenets of any sects or the personal belief of the incorporators."

Riker vs. Sampson, 133 N. Y., 519.

The above case was not concerning a private business corporation, but sustains the doctrine of the inviolability of corporate charters.

The theory of corporations is that the privileges con-



ferred are in consideration of benefits to result to the public, and also that the State receives an equivalent.

Ibid.

Doughdrill vs. Ala. L. I. T. Co., 31 Ala., 91.

The charter is the law of the contract between it and the subscriber to stock.

M., O. & R. R. Co. vs. Cross, 20 Ark., 443.

The importance of the charter is recognized in Evanston Elec. Illn. Co. vs. Kocharsberger, 175 Ills., 26,

where Mr. Justice Cartwright, in delivering the opinion of the Court, said:

“In order to settle this question resort must be had to its charter.”

Legislative power to amend is limited by Constitution.—

In

Distilling Co. vs. People, 161 Ills., 101,  
it was said:

“It goes without saying that the purpose for which a corporation is organized must be ascertained by reference to the terms of its charter.

“The charter of a corporation designed for accomplishment of a particular object, through investment of funds of private individuals—at all events if fairly obtained—is a contract, at least after interests have become vested under it, which the legislature cannot

substantially impair without violating the Constitution of the United States."

Smead vs. J. T. & C. R. Co., 11 Indiana, 104.

The legislature, therefore, cannot make compulsory amendments materially affecting rights under such a charter, unless by virtue of some reserved power.

Ibid.

A corporation is not bound by an amendment taking away the right of the stockholders generally to elect officers and conferring that right on a few, where it is not asked for nor accepted, by a majority of the stockholders.

Although the right to amend the charter of a private corporation may be expressly reserved, that right does not confer upon the legislature the power thus to take from the corporators the control of the corporate property; nor does it authorize the legislature to change the object of the charter by taking the elective franchise from those stockholders having such right to elect officers under the charter, and placing it in the hands of those whose stock, by reason of the increased voting-power conferred by the amendment, will in future be able to control the corporation.

Ibid.

The above case was one concerning a *quasi*-public (turnpike) corporation, and the object sought was to obtain mandamus to compel election of officers, etc. An amendment was made to the charter by the legis-

lature, and in regard to its acceptance Judge Pryor delivered the opinion of the court, and said:

“The acceptance of such an amendment by the corporation should not be dispensed with solely to gratify the desire or advance the interests of those who obtained it without consent of the body corporate.”

Charters are contracts.

Rockland Water Co. vs. Camden, etc., 80 Maine, 544.

But when rights have become vested in stockholders the legislature may not destroy or impair those rights.

Ibid.

The legal existence of a corporation is always open to inquiry at the suit of anyone injured by the doings of a corporation claiming existence through void proceedings.

Bonaparte vs. Balt. & Hamden, etc., Co., 75 Md., 310 (1892).

This is a leading case and discusses at length and in an able manner the question of acceptance of charter, forfeiture and kindred subjects. The opinion of the court is by Mr. Justice Irving; a dissenting opinion was delivered by Mr. Justice Bryan, both of which are well worthy of perusal.

A charter of incorporation is a contract by the State granting it, within the United States Constitution.

New Orleans, Jackson & G. N. R. Co. vs. Harris, 5 C., 517.

The incapacity of the majority to alter fundamen-

tally the charter against the consent of even a single corporator was recognized in the case of  
Curtiff vs. The Manchester & B. C. Co., 12 Eng. Ch.  
R., 131."

Ibid.

See opinion of Chief Justice Smith in the above, and numerous cases cited.

In Nebraska the general corporation statute and the articles of incorporation are considered in the nature of a grant from the State and together constitute its charter.

Livesey vs. Omaha Hotel Co., 5 Neb. 50.

Chief Justice Black has expressed his views on this subject in the following forceful and characteristic manner, holding:

"That an act of incorporation is a contract between the State and the stockholders, is held for settled law by the Federal Court and by every State Court in the Union; all the cases on the subject are saturated with this doctrine. It is sustained not by a current, but by a torrent of authorities. No judge who has a decent respect for the principles of *stare decisis*—that great principle which is the sheet-anchor of our jurisprudence—can deny that it is immovably established. \* \* \* ."

The powers of corporation are to be found in its charter alone, and the rule is that a power not clearly conferred must be deemed withheld.

Bank of Pennsylvania vs. Commonwealth, 19 Pa., St. Rep., 144, 151.

A corporation can have no other powers except such as are conferred by its charter, either in express terms or by implication.

Lagrone vs. Timmerman, 46 South Carolina, 372.

In Tennessee,

City of Memphis vs. Hernando Ins. Co., 65 Tenn. Rep. (6 Baxter), 527

(a case concerning the subject of taxation of corporations and their contractual relations to the State) the holding of the Dartmouth College case, that a charter is a contract, was sustained. That decision appears more reasonable and logical in its terms than the treatment of the same question in Ohio, in certain cases, which we do not deem of sufficient weight to be herein cited.

Chief Justice Nicholson, in the foregoing (City of Memphis vs. Hernando Ins. Co.), said: “\* \* \* If it was an open question in our State, it might be very well questioned whether one legislature has the right by an act of incorporation for a consideration \* \* \* to exempt certain property rights, or franchises, from taxation by a subsequent legislature. But, as remarked by Mr. Cooley on page 280 of his work on Constitutional Limitations, it has so often been decided by the Supreme Court of the United States, though not without remonstrance on the part of State courts, that



it is a contract protected by the Constitution, that the question can no longer be an open one.

“It involves the construction of the United States Constitution forbidding the States to pass laws impairing the obligations of contracts, and on that account the decisions of the Supreme Court of the United States must be regarded as conclusive of the question.

“And right here it may be added that the question of the impairment of the obligation of contract is of that class of rights which has called forth the demand for and which has been contained in every ‘Bill of Rights’ of the English-speaking races.

“The decision of Chief Justice Marshall looked out and beyond the mere petty idea of fattening State treasuries, and reached out to nobler and grander equitable principles: To wit, that any citizen of any one of these confederated States had the right to invest his money in any State corporation, trusting and believing that such States could not and would not make a so-called Indian gift, namely, give to-day and demand back to-morrow. The justice and virtue of the holdings of those greatest of great American lawyers, Marshall and Story, are, and ever will be, on the subject, the supreme law of the land, and above all things wise and just.”

In Utah, the charter must determine the uses and purposes of the corporation.

Irrigation Co. vs. Canal Co., 16 Utah, 246.

The creation of a corporate franchise is an attribute of sovereignty exercisable by the State alone.

Brennan vs. Weatherford, 53 Tex., 336.

In this case Bonner, J., cites approvingly:

Bradley vs. R. R. Co., 21 Conn., 294,

in which it was held that "a more liberal rule of construction is allowed in favor of public charters granted for the general good, than in private charters (granted) for individual gain"; as a corollary to this, it would appear that the construction of private business charters must be strict.

A leading case affecting corporations which existed in the Territories before they were formed into States, is found in

Atty. Gen. vs. R. R. Co., 35 Wisconsin, 425 to 608 inclusive.

The subject involved in this case is one of great moment, and it contains a large amount of excellent matter pertinent thereto, but which cannot be repeated here. The following passages only will be quoted:

"A corporate charter cannot be altered to a charter of an entirely different kind; but a charter may so be altered as to make it different in detail, so long as the general identity of the corporation remains.

"To alter is to make different without destroying identity (Crabbe), to vary without entire change."

The opinion in the above is by Ryan, C. J.

In all things outside and independent of charter privileges, corporations are amenable to, and governed by, the general laws of the State, to the extent and in the same manner as individuals.

Hunt vs. Bulloch, 23 Ills., 320.

The charter of a corporation is the full measure of its powers,

Health U. vs. People ex rel Maloney, Atty. Gen., 166 Ills., 171 (1897).

A corporation has no other powers than those expressed in its charter.

The People vs Pullman Car Co., 175 Ills., 125-182 inclusive (1898).

This case was very important. The opinion was delivered by Mr. Justice Boggs, and as a wise and learned disquisition upon the subject of corporate powers, it is well worthy of careful examination.

In New Jersey, the following was enunciated:

"The case in hand is in marked contrast with Kean vs. Johnson, 1 Stooch (N. J.), 401;

Zabriskie vs. Hackensack, etc., R. R. Co., 3 C. E. Gr. (N. J.), 178;

Black vs. Delaware & Raritan Canal Co., 9 C. E. Gr. (N. J.), 455;

Mills vs. Central R. R. Co., 14 Stew. Eq. (N. J.), 1. in which case the doctrine of the inviolability of contracts between stockholders, without the consent of each stockholder, has been stated, exemplified and up-

held by our courts. In each of them there was a radical change in the purpose and objects of the corporation. \* \* \*

“Both these changes in the contractual rights of the stockholders were held by the learned judge to be a fundamental alteration of the contract and a ‘material deviation’ from the original object, and devotion of the funds to objects ‘essentially different’ from those originally contemplated, etc. \* \* \* And Mr. Beach, in his treatise on Private Corporations, sec. 41, speaking of amendments to charters which should bind stockholders, says: ‘If the amendments be for the benefit of the corporation, or merely auxiliary to the original purpose for which the company was organized, the consent of a majority of the members is sufficient to render it effective and binding upon all the incorporators,’—citing a large number of authorities for that position. ‘But,’ he continues, ‘if the amendments be fundamental, radical and vital, the unanimous acceptance of all the incorporators is requisite to render it binding, etc.’ And in sec. 42, distinguishing between changes that are material and those that are immaterial, he says: ‘Whether an amendment be material or immaterial depends largely upon the circumstances of each particular case. Under certain circumstances, amendments authorizing railway companies to build branch lines have been held to be merely auxiliary to the original purpose of incorporation, and acceptance thereof by a majority of the stockholders was deemed sufficient.”

Meredith vs. New Jersey Zinc and Iron Co., 59 N. J.,  
Eq., 257.

The construction of a charter should be as of any contract between individuals, according to the spirit as well as to the letter.

Spelling on Private Corporations, sec. 138,—citing,

Thomas vs. R. R. Co., 101 U. S., 71;

White vs. Syracuse, 14 Barb., 559.

The incapacity of the majority to alter fundamentally the charter, against the consent of even a single corporator, was recognized in the case of

Curtiff vs. The M. & B. C. Co., 12 Eng. Ch. R., 131.

See opinion of Chief Justice Smith in the same, and numerous cases cited.

A well-ordered discussion of the subject of corporation charters and the contractual obligation will be found in Wharton's Commentaries on American Law, sec. 477 (p. 549 *et seq.*). Philadelphia Edition, 1884. The author cannot refer more explicitly to the contents of that highly esteemed work, which the reader should consult in this connection.



## CHAPTER X.

## By-Laws.

Not necessary, but useful. — By-laws defined. — Power to create, and general purpose. — Must be reasonable. — By-laws must conform to charter, Constitution and statutes. — Right to make by-laws an inherent power. — Reference to decisions discussing subject broadly. — Rule as to judicial interference stated. — Effect of by-laws. — Additional authorities as to validity and judicial interference. — Distinction between by-laws and regulations. — By-laws bind corporate members. — Principle of estoppel applies. — Rights of third parties not prejudiced.

Not necessary, but useful. — By-laws are not absolutely essential to corporate life. The privilege and authority to make and enforce them is, however, a necessary incident to the corporate creation and is one of the implied powers which all corporations possess to promote orderly transaction of business.

**By-laws defined.** — The by-law has been aptly defined by Spelling as

“A rule of a permanent character adopted by a corporation for its internal government, obligatory upon

all its members and also with others who are acquainted with the method of the corporation in doing business.

Spelling on Private Corporations, Vol. I., sec. 396, p. 431.

See Waterman on Corporations, Vol. I., sec. 72, p. 232.

“A by-law is a rule or law of a corporation for its government, or for the government of its members and officers in the management of its affairs. It is a legislative act of the corporation, so to speak, and in enacting it the solemnities and sanctions imposed by the charter must be observed.”

Thompson on the Law of Corporations, Vol. I., sec. 935, p. 762:

Citing, *Drake vs. Hudson R. R. Co.*, 7 Barb. (N. Y.), 508, 539.

Waterman, *supra*, cites Green's Brice's *Ultra Vires*, Vol. II., p. 15 (Am. Ed.).

**Power to create, and general purpose.** — We have seen that in constituting a body corporate, a legal or artificial person is substituted for a natural person, and that where a number of natural persons are concerned there is given to them the property of individuality. The common law of every State or country annexes to this local or artificial person, when created, certain incidents or attributes; and both by the laws of England and the United States there are several powers and capacities which tacitly, and without any express provision, are considered inseparable from every cor-

poration. Kyd enumerates five of these as necessarily and inseparably belonging to every corporation.

*"First.*—To have perpetual succession; and hence all aggregate corporations have a power necessarily implied of admitting members in the room of such as are removed by death or otherwise.

*"Second.*—To sue and be sued, implead and be impleaded, grant and receive by its corporate name, and to do all other acts as a natural person may.

*"Third.*—To purchase lands and hold them for the benefit of themselves and their successors.

*"Fourth.*—To have a common seal.

*"Fifth.*—To make by-laws which are considered as private statutes for the government of the corporate body."

Kyd on Corporations, Vol. I., p. 69.

Angel and Ames on Corporations, sec. 110.

"When a corporation is duly created the law tacitly annexes to it the power of making by-laws or private statutes for its government and support. This power is included in the very act of incorporation; for, as is quaintly observed by Blackstone, 'as natural reason is given to a natural body for governing of it, so by-laws or statutes are a sort of political reason to govern the body politic.' Though the power to make by-laws is unquestionably an incident to the very existence of a corporation, it is rarely left to implication, but it is usually conferred by the express terms of the charter, and where a charter enables a company to

make by-laws in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified, all others being excluded by implication. But when so made they are equally as binding on all their members and others acquainted with their method of doing business as any public law of the State."

Angel and Ames on Corporations, sec. 325.

"\* \* \* What may be bad as a 'by-law' as against common right, may be good as a contract; since a man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or perhaps knowledge, by those who might not know, or would not consult his individual interests. Hence it will be found that a by-law may be void as against strangers, or members who do not assent to it, and yet good as a contract between members of the corporation who do assent to it."

Ibid, sec. 342.

"A by-law must not be inconsistent with its charter, for this instrument creates it an artificial being, imparts to it its power, designates its objects, and usually prescribes its mode of operation; it is, in short, the fundamental law of the corporation, and in its terms and spirit is a constitution to the petty legislature of the body acting by or under it. Hence all by-laws in contravention of it are void. 'The final test of all by-laws,' says Mr. Justice Wilmot, 'is the intention of

the Crown in granting the charter, and the apparent good of the corporation.' ”

Ibid, sec. 343.

“The power of making by-laws binding upon all the members of the corporation, whether it resides in the majority of the body at large or of those present at a corporate meeting, or be confided by charter to a select class, is in trust for the benefit of the whole, and must therefore be exercised with caution.”

Ibid, sec. 347.

“A private corporation cannot repeal a by-law so as to impair rights which have been given and became vested by virtue of the by-law; and this, although the power is reserved by the charter to alter, amend or repeal its by-laws.”

Citing, *Kent vs. Quicksilver Mining Co.*, 78 N. Y., 159.

**Must be reasonable.** — By-laws are intended merely for the protection of the interests of the corporation,

“and have no effect further than is necessary to effect that purpose.”

Angel and Ames on Corporations, sec. 354.

“Whether a by-law is reasonable or not is a question for the court solely; and evidence to the jury on the subject, showing the effect of the law, is held inadmissible.”

“To set a by-law aside for unreasonableness there should be no equipoise of opinion on the matter, but



its unreasonableness should be demonstrably shown."

Ibid. sec. 357,

citing among others,

Commonwealth vs. Worcester, 3 Pick (Mass.), 462.

Judge Wilde, in delivering the opinion of the court in this case, said:

"It was for the court to decide whether the 'by-law' was reasonable or not."

"The by-laws of a corporation, made in pursuance of their charter, are equally binding on all the members and others acquainted with their method of business 'as any public law of the State.' "

Cummings vs. Webster, 43 Maine, 192 (a leading and much cited case); syllabus.

"The office of the by-law is to regulate the conduct and define the duties of the members toward the corporation and between themselves; so far as its provisions are in the nature of a contract, the parties thereto are the members of the association, as between themselves or the corporation upon one side and the individual members on the other. The right of any third party, stranger to the association, to establish a legal claim through such a by-law, must depend upon the general principles applicable to express contracts, as laid down in

Mellen vs. Whipple, 1st Gray (Mass.), 317,  
and the subsequent decisions in

Field vs. Crawford, 6th Gray (Mass.), 116, and

Dow vs. Clark, 7th Gray (Mass.), 198.

No action can be maintained by such third party unless

he can bring his case within some of the recognized exceptions to that general rule."

Chief Justice Green, in *State vs. Overton*, 24 N. J. L. Reps., 435, 440, said:

"The validity of a by-law of a corporation is purely a question of law. Whether the by-law be in conflict with the law or with the charter of the company or be in a legal sense unreasonable, is a question for the court and not for the jury."

Citing, *Commonwealth vs. Worcester*, 3 Pick (Mass.), 462. *Angel and Ames on Corporations*, sec. 357. In *The Northwest Electric Co. vs. Walsh*, xxix. Canadian Supreme Court Rep., p. 33,

the opinion of the majority of the court was by Sedgwick, J.

The learned justice said:

" \* \* \* And in the third place the by-laws and resolutions were bad upon the general common-law principle that a by-law must not be unreasonable or work unequally toward members of any class affected by it. \* \* \* This clear, manifest and gross favoritism stamps the by-law on its face as invalid."

See also, *Hoblyn vs. Rex*, 2 Brown's cases in Parliament (2d Ed.), 329.

By-laws must conform to charter, constitution and statutes. — In

*Am. and Eng. Encyc., etc.*, 2d Ed., Vol. VII., p. 694, subdivision 5, the following appears, viz.:

"Every corporation aggregate has the right to enact by-laws for the government of the corporate body. These by-laws must not be inconsistent with its charter or the purposes and objects of its creation, and they must not be repugnant to the common law or the laws of the land, constitutional and statutory."

Citing, *Wells vs. Black*, 117 Cal., 154.

*Vercoutere vs. Golden S. L. Co.*, 116 Cal., 410.

*Burden vs. Burden*, 8 App. Div. (N. Y.), 160,  
and other cases.

"It is essential to the validity of a by-law that it should conform to the Constitution of the United States and the acts of Congress pursuant thereto, to the constitution and statutes of the State in which it is located and to the common law as it is there acknowledged. The Constitution being the supreme law of the land, and all enactment contrary to it void, it follows that no act of Congress or of a State legislature can give power to make unconstitutional laws and regulations. *Waterman on Corporations*, Vol. I., p. 236, sec. 74, etc.

"\* \* \* Consequently, corporations have inherent in them the power to make all such by-laws as are requisite for the due management of their affairs and for determining the conditions of membership, at common law, when a corporation was duly created, there was tacitly annexed to it the power of making laws for its own government and support.

\* \* \* \* \*

"Though they have this general power to make by-laws to further the purposes of their incorporation,

such by-laws must be within their power—in harmony not only with the general laws of the State, but must be reasonable in their provision, and not in restraint of trade, or they will be void in law.”

State vs. Overton, *supra*.

5 Cowen (N. Y.), 462;

Austin vs. The Selectmen of Charlestown, 16 Pick. (Mass.), 121;

Kyd on Corporations, sec. 107, etc.;

Potter on the Law of Corporations, Vol. I., p. 114, etc.

A corporation cannot, even by legislative authority, make by-laws to contravene, repeal or in any wise change the statutory or common law of the land.

*Ibid* (Potter), p. 116.

“The true test in construction of by-laws in this country is the intention of the legislature in granting the charter, and the apparent good of the corporation, and this construction must be a reasonable one. \* \* \*”

*Ibid*.

See

Dunham vs. Trustees of Village of Rochester, 5 Cowen (N. Y.), 462;

Taylor vs. Griswold, 2 Green (N. J.), 223;

People ex rel Muir vs. Throop, 12 Wend. (N. Y.), 183.

“The great function of by-laws is to regulate, control and manage the affairs of the corporation. They create a kind of contract between the members on the one part and the corporation on the other, generally

directed to the conduct, and to define the duties of the officers and members of the corporation between themselves. They are not intended to interfere with the rights and privileges of third parties or strangers, nor could they be made binding on them. They are binding as rules in the transfer of stock; to secure a lien upon the holder for his indebtedness to the corporation, to which any purchaser must take it subject; but to effect these objects the by-law must be entered or registered on the books of the corporation."

*Ibid.* (Potter on the Law of Corporations), p. 120.

Generally, by-laws are only binding upon its own members and officers.

"These the by-laws obligate, upon the ground of their express or implied consent to them; nor is it an objection to a corporator's being bound by a by-law that he had no notice of it, or that he was not a member of the corporation at the time the by-law was passed."

*Ibid.* p. 122.

Power to make by-laws must be exercised with discretion. \* \* \* This power presupposes the right to enforce penalties, but such discipline must be reasonable, in the light of each special state of circumstances.

*Ibid.* p. 124.

Citing, 2 Kyd on Corporations, sec 156.

Wilcock on Corporations, sec. 368.

Paxton vs. Sweet, 1 Green (N. J.), 196.



Right to make by-laws an inherent power. — A much cited English case, *Norris vs. Staps*, 1 Hobert, 211 (Boston Ed., 1829, p. 369), Hobert, J., contains the following:

“Corporations have power to make reasonable by-laws without an express grant of such power. \* \* \*

“Now I am of the opinion that though power to make laws is given by special clause in all corporations, yet it is needless; for I hold it to be included by law, in the very act of incorporating, as is also the power to sue, to purchase and the like.

“It is implied in the charter of every private corporation that the majority shall have power to make reasonable rules, regulations or by-laws for the government of the company, and the validity of such by-laws depends upon the implied agreement of all the shareholders \* \* \* and therefore any by-law properly enacted by a majority is as binding upon the members of the corporation as a provision contained in the charter itself.

(See, Morawetz, sec. 491.)

“\* \* \* such power, express or implied, is limited to such by-laws as are in harmony with the charter of the corporation, which is its fundamental law. By-laws which are calculated to assist in carrying into effect the purposes of the corporation are valid; but every by-law which is contrary to the charter, either in

its special provisions or its main purposes, is unauthorized and void."

(See, Morawetz, 494.)

The power to make by-laws is an incident to corporations.

Spelling on Private Corporations, Vol. I., sec. 396,  
p. 431.

**Reference to decisions discussing subject broadly. —**

Extent and power of corporations to make and alter by-laws, etc., etc., is exhaustively discussed in

Kent vs. Quicksilver, 78 N. Y., 159;

Parish vs. N. Y. Produce Exchange, 60 App. Div.  
(N. Y.), 16-17.

The opinion in the last-named case is by O'Brien, J.,  
(Van Brunt, P. J., and Ingraham and McLaughlin,  
J. J., concurred): Affirmed in Court of Appeals, 169  
N. Y., 34—a leading case and high authority.

See also

MacNaughton vs. Osgood, 41 Hun. (N. Y.), 109.

At the close of the opinion Landon, J, says:

"There is a plain distinction between a case in which the corporation may, at its own option, avoid such a contract and a case in which the corporation, from the fact that it is despoiled and in the hands of the spoilers, ought to be adjudged to avoid it."

**Rule as to judicial interference stated. —** See opinion of Edwards, J., in

Burden vs. Burden, 8th App. Div. (N. Y.), 160, 174,  
as to this subject in general.

The unanimous opinion of the court (*Burden vs. Burden*) is in part:

“Whatever may have been the common-law doctrine in respect to the courts over by-laws enacted by corporations as one of their incidental powers, I cannot conceive how, under this statute, the court can pursue its investigation further than to inquire whether it is ‘inconsistent with the laws of this State.’ The question of the wisdom or expediency of a by-law is quite foreign to a proper judicial inquiry. The law has wisely left that question to the better judgment of the trustees. A motion was made at a special term held by Mr. Justice Peckham for a preliminary injunction restraining the defendants from acting under By-law No. 11, as adopted November 21, 1884, which was subsequently rescinded, and of which the one in February 27, 1885, is conceded to be substantially a re-enactment. The motion was denied and the learned judge in his opinion says: ‘The by-law may perhaps be no more than the due exercise of the power of internal administration, and if so it rests necessarily with the majority of the shareholders, and so long as they act with good faith and do not go beyond the capacities of the corporation, as fixed by its charter, the minority must submit; the courts do not interfere unless the corporation, or a majority, may be about to do some act outside of the scope of its authority or in disobedience to its charter.’ ”

But it must not be lost track of that it has time out

of mind been held that the majority must not make unjust or oppressive or unreasonable by-laws.

“\* \* \* The doctrine of a by-law being unreasonable, \* \* \* when an attempt has been made to enforce it against a third person, has no application to a question of delegation of authority under the statute, and I think no case can be found where a delegation of power has been held to be invalid because it was deemed to be unreasonable.”

Ibid.

The power of the court to determine whether a by-law is unreasonable or void, was upheld (somewhat in conflict with *Burden vs. Burden, supra*), in *Matthews et al. vs. Associated Press*, 136 N. Y., 333 (1893).

In this case Mr. Justice Peckham, who is quoted in *Burden vs. Burden, supra*, explains his views and extends their application as follows:

“If the by-law be unreasonable or oppressive, or if it tend improperly to restrain trade and thereby create a monopoly, or if it be an unlawful interference with a member’s right to contract, or if it restrict the liberty of the press, in any or all of these cases the by-law would be beyond the power of the company; to adopt or pass it would be illegal. In this case the test was made as to its illegality and it was found by the court that it was not.”

In this judgment the whole bench concurred. Thus the highest tribunal of New York has unanimously

sustained the proposition that to be valid, by-laws must not be "unreasonable or oppressive," and that it is the function of the court to determine such fact; furthermore, that the consistency of a by-law, when compared with the charter, is not the only test which the court will apply in determining the validity of the former.

The power of the court to determine as to the validity of by-laws is again recognized in

Monroe Dairy Ass'n vs. Webb (1899), 57 N. Y. Supp., 572; 40 App. Div., 49.

An unanimous decision, opinion by Cullen, J.

By-laws must be reasonable.

Dunham vs. Trustees, etc., of Rochester, 5 Cowen (N. Y.), 462.

Only enacted in home State of corporation.

Mitchell vs. Vermont Copper M. Co., 47 How. (N. Y.), 218. Affirmed, 67 N. Y., 280.

See

Abbott's New Encyc. Dig., Vol. IV., p. 45, etc.

"A corporation has the power by implication, even when not conferred in express terms, to make such by-laws as may be reasonably necessary or proper for the purpose of prescribing rules for its government and regulating the conduct and defining the duties of its members and to alter and amend or repeal the same. But the power is subject to the following limitations:

*First.*—The by-laws must be reasonable, and not be contrary to law.



*Second.*—They must not be inconsistent with the charter, the enabling act or the articles of association.

*Third.*—They must not deprive a member of his vested right, nor impair the obligations of his contract membership.

*Fourth.*—The power must be exercised by the authority and in the mode prescribed by the charter of the corporation or the general law.”

Clark and Marshall on Private Corporations, 5th Edition, 3d Vol. p. 1938, sec. 636.

“A by-law may be good in part and void for the rest.”

Rogers vs. Jones, etc., etc., 1 Wendell (N. Y.), 238.

“\* \* \* The right to pass the by-law in question is not conferred by statute. \* \* \* But it is said that the by-law of a town or corporation is void if the legislatures have regulated the subject by law. If the legislatures have passed a law regulating certain things in a city, I apprehend the corporators are not thereby restricted from making further regulations.”

Ibid.

The case of

Thomas vs. Musical Mutual Protective Ass’n, 2 N. Y. Supp., 195, *supra*.

lays down the general rule that by-laws which are arbitrary and contrary to the provisions of the corporate charter are void. See also the dissenting opinion of Mr. Justice Daniels, who held that the standard to which the by-law must be brought is,—whether or

not it does in fact conflict with the statutes of the State.

Notwithstanding the disagreement of learned judges, the first stated measure of the validity of a by-law would appear to be plainly founded on reason and the one which should prevail.

**Effect of by-laws.** — For the effect of by-laws see *Knox vs. Eden Musee Am. Co.*, 25 N. Y. Supp., 168; 148 N. Y., 441.

This is the leading authority in New York.

**Additional authorities as to validity and judicial interference.** — In

*Village of Buffalo vs. Webster*, 10th Wendell, 100, Chief Justice Savage said:

“The trustees are authorized to make such prudential by-laws as they may deem proper, relative to public markets, etc, etc., \* \* \* providing they are not inconsistent with the laws of the State or United States. \* \* \* The only question in the case is, whether the by-law is valid. At common law corporations have power to make by-laws for the common benefit. They must not be in restraint of trade, nor impose a burden without an apparent benefit. If it appears to the court to be reasonable, it is sufficient, though it be not averred in the pleading to be so. \* \* \* But general restraints are bad.”

The right to make and establish by-laws, rules and regulations concerning admission or expulsion of

members, although in general terms, is not an arbitrary unlimited power. See

The People ex rel. Gray vs. Medical Soc. Ass'n Co.,  
24 Barb. (N. Y.), 570, 572,  
and the opinion of Marvin, J. (Sp. T., 1857) :

“When a corporation is duly created the law tacitly annexes to it the power to make by-laws or private statutes for its government and support, so that the corporation in this case would have had the power to make by-laws had the statute been silent on the subject; it is usual to confer the power by the charter or law authorizing the corporation. If the power is expressly conferred in general terms, it is construed as an authority conferred for the purpose of enabling the corporation to accomplish the objects of its creation, and the power in its exercise is to be limited to such objects or purposes.”

(Citing, Angel and Ames on Corporations, sec. 268; 2 Kent, 296.

Grant on Corporations, sec. 96).

“A by-law must not be at variance with the general law of the land; it must be reasonable and adapted to the purposes of the corporation. Kent says these corporate powers of legislation must be exercised reasonably and in sound discretion and strictly within the limits of the charter and in perfect subordination to the Constitution and the general law of the land and the rights dependent thereon; subject to these limitations, the power to make by-laws may be sustained and

enforced by just and competent pecuniary penalties."

Citing, 2 Kent, 296.

Grant on Corporations, 76.

King vs. Corporation of New Castle, 7 T. R., 548.

King vs. Toppenden, 3 East, 186.

Ibid., 24 Barb., p. 375.

Nelson, C. J.,

In re Long Island R. R. Co., 19 Wend. (N. Y.), 37,  
said:

"The corporation possesses the power to make by-laws not inconsistent with any existing law, for the management of its affairs."

In further consideration of the case the learned Justice continued:

"This is the broadest general power conferred upon it, but it is not new, and would have existed as incidental. When taken as incidental it must be exercised in conformity with the general laws of the land, that being the rule to regulate the proceedings of artificial bodies as well as the conduct of natural persons, independently of express provisions of those charters to the contrary. This general law has ascertained the rights of persons and of property of the citizen and established modes of procedure in case of a violation of them, and corporate bodies must conform to them in seeking redress the same as individuals. The former can no more take the remedy into their own hands than can the latter. So strict is this salutary principle of subjection in England that even a by-law in pur-

suance of an express power in a charter granted by the King is void if contrary to the common law."

*Ibid.* 40 and 42, and cases cited.

By-laws contrary to Magna Charta are void; so with by-laws in restraint of trade.

*Ibid.*

A corporation cannot make by-laws and rules which affect the rights and interests of third persons.

*Mechanics' and Farmers' Bank vs. Smith*, 19 Johnson (N. Y.), 115.

In the last cited case, Woodwarth, J., said:

"The power of making rules and regulations is necessarily incident to a corporation."

"It is implied in the charter of every private corporation formed for the pecuniary benefit of its members, that the majority shall have power to make reasonable rules and regulations or by-laws for the better government of the company."

*Morawetz on Private Corporations* (2d Ed.), Vol. 1, p. 462, sec 491.

Citing, *Blackstone Commentaries*, secs. 475 and 476, and numerous cases.

The validity of by-laws prescribed by the majority depends upon the implied agreement of all the shareholders in forming the corporation; therefore, any by-law is as binding upon the members of the company as a provision contained in the charter, or in a certificate under the general law.

*Ibid.*



Citing, *Cummins vs. Webster*, 43 Maine Reps., 192, 197;

also refers to

*McDermott vs. The Board of Police*, 5th Abb. Prac. Rep. (N. Y.), 422.

*The Corporation, etc., vs. The Mayor, etc.*, 5 Cowen (N. Y.), 538.

The term "by-law" was originally applied to the laws and ordinances enacted by public or municipal corporations. The difference between a "by-law" of a private company and a law enacted by a municipality is wide and obvious. The former is merely a rule prescribed by the majority, under authority of the other members, for the regulation and management of their joint affairs.

A "by-law" of a municipal corporation is a local law, enacted by public officers by virtue of powers delegated to them by the State.

Ibid. (Morawetz, sec. 492.)

That reliable author continues:

"\* \* \* The majority have implied authority to prescribe any by-law which is reasonable and calculated to carry into effect the objects of the corporation in pursuance of its charter."

(See cases cited.)

"\* \* \* the majority may also make by-laws regulating the directors and other agents of the company in managing the corporate business."

Citing, *Savings Bank of Hannibal vs. Hunt*, 72 Mo., 597, *Ibid*, sec. 597.

In the foregoing case it was held (syllabus) :

"That any savings bank may enact a by-law requiring its cashier to give bond for the faithful performance of the duties of his office."

"Such enactment would be but a reasonable exercise of the power conferred by statute on all corporations of making by-laws not inconsistent with existing laws for the management of their property, the regulation of their affairs, etc."

"A by-law adopted under express authority given in charter is of the same binding force as though it was enacted by the legislature."

Citing, *The Corporation, etc., vs. The Mayor, etc.*, 5 Cowen (N. Y.), 538.

*McDermott vs. The Board of Police*, 5 Abb. Prac. Rep. (N. Y.), 422.

*Kent vs. Quicksilver M. Co.*, *supra*.

"Although the common law annexes to a corporation certain incidental rights, among which is the right to adopt by-laws as private statutes for its government, yet, when the statute declares expressly that the corporation shall have power to make by-laws in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified."

Citing, *inter alia*, *State, etc., vs. Mayor of Morristown*, 33 N. J., 57.

In the above (State vs. Mayor), Dupree, J., in delivering the opinion of the court, said:

“The case

Norris vs. Staps, 1 Hobert, 210.

\* \* \* well held that a special clause authorizing such an organization to make by-laws did not add anything to its implied powers, and that its by-laws were subject to the general law of the realm as subordinate to it.

“A special grant of power to a municipal corporation by the legislature is an entirely different thing; such a grant is a delegation of authority to legislate by ordinance on the enumerated subjects and does not add to the power incident to creation of a corporation.

“In the absence of law, or immemorial custom to the contrary, the power to make by-laws belongs to the members of the corporation (*i. e.*, stockholders).”

Waterman on Corporations, Vol. I., sec. 73, p. 233  
*et seq.*

“\* \* \* power to adopt by-laws implies power to repeal.”

Ibid.

“Where charter gives power to make same in certain form and particular manner, power must be strictly followed. \* \* \* Where a right or a remedy are privileged by some law, the law must pursue the remedy provided by it. \* \* \* One who voluntarily becomes a member of a corporate body cannot object

that the corporation had no power to make the by-laws."

Ibid.

The subject of "by-laws" is most exhaustively treated by Mr. Thompson in his Commentaries on the Law of Corporations; see Vol. I., Chap. XVIII., of that work.

By-laws of corporations are interpreted according to the same principles which govern in the interpretation of statutes.

Thompson's Commentaries, Vol. I., sec. 948.

"It is said that the term 'by-laws' has a peculiar and limited signification, and that it is used to designate 'the orders and regulations which a corporation, as one of its legal incidents, has a power to make and which is usually exercised to regulate its own actions and concerns and the rights and duties of the members among themselves.'"

Thompson, Vol. I., sec. 935,

Citing, *Commonwealth vs. Turner*, 1 Cushing (Mass.), 493; also

*Flint vs. Pierce*, 99 Mass., 68.

**Distinction between by-laws and regulations.** — By-laws are distinguished from regulations in that one is special, the other general.

The distinction between by-laws and regulations is: By-law binds members only; regulation affects third

persons who deal with the corporation, having notice of it.

Thompson, sec. 942.

See

Hadencamp vs. Second Ave. Ry., 1 Sweeny (N. Y.), 490.

Baltimore vs. Wilkmin, 30 Md., 224 (a case in negligence).

Harris vs. Stevens, 31 Vermont, 79.

**By-laws bind corporate members.** — By-laws, if in conformity with charter or governing statute, are as binding upon corporate members as State laws, and are believed by some to be as binding upon third persons acquainted with the corporation's methods of business.

Ibid., sec. 939.

See to the above effect :

Cummings vs. Webster, 43 Maine, 192.

Weatherby vs. Medical Society, etc., 76 Ala., 567.

Kent vs. Quicksilver, etc., 78 N. Y., 159.

Harington vs. Workingmen's Benev. Ass'n, 70 Ga., 340.

Poultry vs. Bachman, 31 Hun. (N. Y.), 49.

Members of a corporation are charged with a knowledge of its by-laws and are presumed in law to know what they are, *i. e.*, have constructive notice of them.



This is a legal presumption, and direct proof is not required.

See

Thompson, sec. 941.

In Illinois, in

Green vs. Board of Trade of Chicago, 174 Ills., 585, the subject of by-laws was laid down by Mr. Justice Phillips in delivering the opinion of the Court (October, 1898):

One becoming a member of such a corporation or association ( a board of trade), and subscribing to the by-laws, agrees to submit to its rules and regulations.

Citing, Bauer vs. Samson Lodge, etc., 102 Indiana, 262.

The Presbyterian Assurance Fund vs. Allen, 106 Indiana, 593.

The by-laws to which such member agrees to submit are such as are authorized by the nature of the corporation and the laws of the country, and hence must not be contrary to the policy of the law or unreasonable.

Citing, Layre vs. Louisville, etc., 20 Duval, 143.

People vs. Throop, *supra*, (12 Wend. [N. Y.], 183).

**Principle of estoppel applies.** — Estoppel acts against a stockholder who participated in the adoption of the by-laws.

People ex rel. Wallace vs. Sterling B. C., etc., 82 Ills., 457.

**Rights of third parties not prejudiced.** — By-laws cannot prejudice rights of third parties without notice.  
Spelling, sec. 404.

## CHAPTER XI.

### Stock and Stock-Certificates.

Varied uses of term. — Legal signification. — Distinction between certificate of incorporation and stock certificate. — Nature of stock certificate considered. — Principle governing right to transfer. — Stock certificate is only quasi-negotiable. — Limited negotiability affects lost or stolen certificates. — General remarks.

Varied uses of term. — Few words in the English language have more varied meanings than the term "Stock"; some thirty or more significations are found enumerated in Webster's, Worcester's, The Century, Standard and other dictionaries.

**Legal signification.** — In its legal aspect, it has been defined as:

"Money or property employed as a basis for the transaction of business."

English Law Dictionary, p. 749.

With this definition before us, we are justified in saying that the "Stock" of a corporation represents collectively the money, property, privileges—in fine, the entire effects and assets of the corporation.

Other definitions are:

"The amount of money or property subscribed and paid in by the shareholders."

Cyclopedic Law Dictionary, p. 873.

A right to partake, according to the amount of the subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company:

Angel and Ames on Corporations, sec. 557,—cited in Bouvier's Law Dictionary, Vol II., p. 1039.

"The capital stock (of a corporation) is that money or property which is put into a fund by those who, by subscription therefor, become members of the body corporate.

"That fund becomes the property of the aggregate body only. A share of the capital stock is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation; and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for debts of the corporation. \* \* \* These shares are intangible and rest in abstract legal contemplation."

Burrall vs. Bushwick R. R. Co., 75 N. Y., 211,—cited in Bouvier's Law Dictionary, *supra*.

"The capital of a company is generally divided into shares, so that 'shares' and 'stock' are in one sense the same thing. \* \* \*"

Rapaly and Lawrence's Law Dictionary, p. 1225.

"'Stock' was the short name for joint stock; and 'joint stock,' in my opinion, is only another name for 'shares,' because the owner of part of the capital of a

company is an owner of a part of the joint stock or an owner of a share of the joint stock";—

Per Cairns C., in *Norrice vs. Aylmer*, 44 L. J., Ch., 214. Affd. 45 L. J., Ch., 614;

quoted in

Strand's Judicial Dictionary, p. 1938.

The stock is ordinarily divided into equal shares of a determined value, and apportioned among the stockholders in proportion to the amount which they have paid in, or for which they are liable.

"Distinction has been made between the capital stock, which is an asset of the corporation, and the shares of stock, which are the property of the several shareholders."

Cyclopedic Law Dictionary, p. 873.

Citing, 34 English and American Reported Cases, 223.

From the foregoing authorities it is apparent that while "stock" represents collectively the entire assets of the corporation, it (the stock) may be, and in practice usually is, divided into parts or "shares," which have distinctive rights, and which entitle the owner and holder to participate in the profits or proceeds of the corporate property.

The evidence of such ownership is comprised in a writing known as a "certificate"; but here the paucity of terms and the consequent duplication of meanings have bred some confusion.

**Distinction between certificate of incorporation and stock certificate.**— There are two separate and dis-



inct corporation certificates: One, the "Incorporation Certificate," which in effect performs the functions of a specially granted charter, as shown before under the head of the "Charter," Chapters VIII. and IX.; and the other, correctly styled the "Stock Certificate."

**Nature of stock certificate considered.**—Concerning the latter, extensive discussion has been had, not only in the various treatises on corporations, but also in the courts, in much and varied litigation principally involving the question whether such certificates, in regard to their convertibility, are governed by the principles, rules and practice applicable to commercial paper.

From such treatises and decisions it may be deduced that:

1.—The Stock Certificate is a writing under the corporate seal, duly executed and authenticated by the officers of the corporation, with the date thereof and setting forth the number of shares held by the owner, the par value of such shares and the total number of shares of the corporation.

2.—The certificate is not the stock itself, but is the evidence of the ownership of the number of shares therein certified to. The owner and holder of the certificate is a stockholder, endowed with the rights, privileges, powers, duties and other incidents pertaining to the relation.

3.—The certificate not being the stock itself, but merely the evidence of the stockholder's ownership,

actual manual possession thereof is not required to enforce or sustain his rights; for other evidence of equal degree may be adduced to accomplish the same object.

4.—While the stock certificate is not “negotiable paper,” nor governed by the principles, rules and practice applicable thereto, yet the exigencies of business and the facilitation of commercial intercourse have demanded that in appropriate cases it be endowed with some of the attributes of such “paper.”

In support of the foregoing, and generally concerning the “Stock Certificate,” the following excerpts and cases are subjoined.

“A share of stock is without ‘earmarks’ and cannot be distinguished from other shares of the same corporation and issue. The certificate-bearing dates and numbers are but evidence of title.”

Hubbell vs. Drexel, 11 Fed. Rep., 115.

This leading case was decided in the U. S. Circuit Court, E. D., Penna. (1882.)

It would seem from the above that the ownership of shares in the capital stock of a corporation is like the rights of tenants-in-common in land—no one of them can distinguish as his own the identity of any particular part, even down to the utmost limits of the divisibility of matter. The numbers which are given in stock certificates are merely for convenience and do not in any wise serve to identify any particular or special ownership.

"As soon as the corporation has any property or valuable franchise the members become stockholders in proportion to their respective interests. The certificate or scrip is not a transfer from the corporation, but merely evidence of an existing right."

Burr vs. Wilcox, Ext'r, 22 N. Y., 551.

The opinions in this case were by Mr. Justice Clark and Mr. Justice Selden. All the other Justices concurred.

Mr. Justice Selden, in his opinion, said, *in his verbis*:

"The certificate is simply a written acknowledgment by the company of the interest of the subscribers in its property and franchises."

Ibid, p. 555.

In the Alabama Supreme Court, (1896), Chief Justice Brickell has well said:

"The shares constituting the stock of a corporation are now regarded by the common law, whether the property owned by the corporation is real or personal, as personal property, capable of alienation or succession in any of the modes by which that species of property may be transmitted; strictly speaking they are not chattels, but are rather 'choses-in-action,' or, in other words, they are merely evidences of property.

(Citing, Angel and Ames, Cook, and Thompson.)

"As evidence of ownership—as a muniment to title—corporations are accustomed to issue certificates to the shareholders. The certificate is but the written

acknowledgment by the corporation of the shareholders' interest in the corporate property and franchises. It operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights,"

Citing, Cook, *supra*.

Nelson vs. Owen, 113 Alabama, 372.

"In legal contemplation the certificate was merely an additional and convenient evidence of the ownership of the stock."

Cincinnati, Union, etc., Ry. Co. vs. Fearn, 28 Indiana, 502, 508.

In the California Supreme Court it was held, in substance, that where stock certificates were issued to "P" and by him assigned to "H," who surrendered them to the corporation, which thereupon issued new certificates to "H" in his own name, this did not affect the identity of the stock.

Hawley vs. Brumigan, 33 Cal., 394.

Stock is one thing and certificates are another.

*Ibid*, 399.

See opinion therein by Mr. Justice Sanderson.

"A certificate of stock has always been deemed *prima facie* evidence of ownership."

Broadway Bank vs. McIlrath, 13 N. J., Eq., 29.

Certificates of corporate stock are technically only written evidence of interest in the corporate property.

Merritt vs. Am. Steel B. Co., 79 Fed. Rep., 228.

They are simply evidences of indebtedness on the

part of the individuals or corporations who issue them; but in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels; they may be hypothecated or pledged; they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

Ibid, 235.

"A certificate of stock is only a convenient voucher."

Johnson vs. Albany and Susquehanna Ry. Co., 40 How. (N. Y.), 196.

"A certificate of stock is, from one point of view, a mere muniment of title, like a title-deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the stockholder in the corporate property and franchises. It operates to transfer nothing from the corporation to the stockholder, but merely affords the latter evidence of his rights."

Cook on Corporations (5th Ed., Chicago, 1903), sec. 13.

Actual possession of a certificate of stock is not necessary to complete ownership, nor is it essential to the existence of a corporation that any certificates be named at all.

Ibid.

Citing, Burr vs. Wilcox' Ext'r, 22 N. Y., 551.



Chester Glass Co., vs. Dewey, 16 Mass., 94.

Pietch vs. Krause, 93 N. W. Rep., 9.

Upon this subject, in

Clark and Marshall on Private Corporations (St. Paul, 1901), sec. 378,

it is said in substance that it is usual for a corporation having a capital stock divided into shares to issue to its stockholders a certificate of stock, or stock certificates, showing that the person named therein is the owner of the number of shares therein specified; \* \* \* that the certificate is not the stock, but mere evidence of the stockholder's ownership.

"A certificate is merely the paper representative of an incorporeal right, and it stands on a similar footing to that of other muniments of title. It is not in itself property, but is merely the symbol or paper evidence of property; hence the proprietary right may exist without the certificate."

Thompson on Corporations, Vol. II., p. 1730, sec. 2348,

and see cases cited.

"The shares of stock cannot be issued and delivered as a physical fact. What the corporation can do, and what under some circumstances it may be compelled to do, is to issue and deliver written proof of the existence of shares and of the ownership of them, usually called 'Stock Certificates.'"

Waterman on the Law of Corporations, Vol II., p. 84, sec. 168.

**Vender liable on implied guaranty.** — “\* \* \* Stock may be transferred without a transfer of the certificate, and if the transferer afterward transfers the certificate to another party, he is liable to the transferee.”

Cook on Corporations, sec. 13.

“Certificates of stock are negotiable instruments. They have sometimes been said to have a ‘*quasi*’ negotiability, but his phraseology throws little light upon the real character of the transferability of stock. It may be said in general that by the operation of the law of estoppel the purchaser of a certificate of stock, in good faith and for value, may take it free from any claims of previous holders, which would be allowed to come in, in the case of a sale of an ordinary chose-in-action. \* \* \*”

Spelling on Private Corporations, sec. 516, etc.

Citing, *Merritt vs. Am., etc., Co.*, 79 Fed. Rep., 228.

And here may be noted the rule of law regarding stock claimed by a transferee, founded upon possession of the certificate. In such instances, where a wrongful possession of the certificate is alleged, the question of estoppel arises, as well as the further question how far the original and true owner of the certificate had contributed to the wrong done, either overtly or by sufferance. In cases of this description the well-known principle laid down in

*Hannah vs. Hannah*, 68 N. Y., 610,

applies. This old and highly equitable rule may be stated, in substance, as follows: When a loss must be sustained by either of two parties, the one who

has made the injury possible should be the first to suffer. This is ably expressed in the case of

Knox vs. Eden Musee, 148 N. Y., 441,

where the learned Chief Justice Andrews quoted approvingly the familiar statement of Lord Holt in

Hern vs. Nichols, 1 Salk, 289:

“For seeing somebody must be a loser by this deceit, it is more reason that he that employs and put a trust and confidence in the deceiver should be a loser, than a stranger.” At an earlier place in the decision, the following appears:

“The principles applicable to negotiable paper have been extended to embrace public debentures payable to bearer, and bonds of corporations and some of the incidents of negotiability have either by custom or statute been applied to instruments not strictly negotiable. Certificates of stock in business corporations are embraced in the class last mentioned. They are not negotiable in form, they represent no debt and are not securities for money. But the courts of this country, in view of the extensive dealings in certificates of shares in corporate enterprises, and the interest, both of the public and the corporation which issues them, in making them readily transferable and convertible have given to them some of the elements of negotiability. The owner of shares may transfer his title by delivery of the certificate with the blank power of attorney endorsed thereon signed by the owner of the shares named in the certificate. Such a delivery transfers the legal title to the shares

as between the parties to the transfer, and not a mere equitable right”;

See, *McNeil vs. Tenth National Bank*, 46 N. Y., 325, cited therein.

Chief Justice Sherwood, of Pennsylvania, in delivering the opinion of the court in an important case, said:

“Shares of stock in a corporation are choses in action, giving a right to dividends and an interest in the capital. The certificate is the evidence of such ownership and there can be no doubt that if the certificate is forged, or the holder is not such *bona fide*, so that he has no claim on the corporation, the vender would be liable to his vendee on the implied warranty of title. His possession of the certificate would be as to his vendee possession of the stock, just as possession of a bond or note is possession of a debt which they represent.”

*People's Bank vs. Krutz*, 99 Penn. St., 34.

**Principle governing right to transfer.** — “By general mercantile usage, shares in a corporation are assignable by indorsements and delivery of the certificates issued to the owner as evidence of his rights.”

*Morawetz on Corporations*, secs. 185, 186.

In the celebrated case in the United States Supreme Court (1870),

*Bank vs. Lanier*, 11 Wallace (U. S.), 369, the opinion of the court was delivered by Mr. Justice David Davis, one of our most learned and able jurists,

whose opinions have been regarded with favor by both bench and bar. In this opinion, p. 377, it was said:

“\* \* \* Obviously, whatever contributes to make the shares of the stock a safe mode of investment and easily convertible tends to enhance their value. It is no less the interest of the shareholders than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country and are sold in the open market as other securities; although neither in form or character negotiable paper, they approximate to it as nearly as practicable. \* \* \* No better form could be adopted to assure the purchaser that he can buy with safety. He is told under the seal of the corporation that the shareholder is entitled to so much stock, which can be transferred on the book of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to anyone not in possession of the certificate.”

Bank vs. Lanier, *supra*.



Stock certificate is only quasi-negotiable. — "Certificates of stock in business corporations have been given most of the elements of negotiability. A transferee in good faith and for value holds his title free from latent equities between prior parties in the line of transmission.

\* \* \* \* \*

"Certificates of stock in a business corporation, indorsed in blank, do not possess the quality of complete negotiability accorded to commercial paper, to the extent of making a transfer to a purchaser for value equivalent to actual title — although there was no agency in the transferor and the certificate had been lost without the fault of the true owner, or had been obtained by theft and robbery."

Syllabus in—Knox vs. Eden Musee, 148 N. Y., 441.

"\* \* \* upon principle and authority it is manifest the certificate has not in it the elements and characteristics of negotiable or commercial paper. It is not an evidence or debt, nor an order for the payment of money; it is but a muniment of title. While this is true, a species of negotiability, or to use the phrase sufficiently for all practical purposes, a '*quasi-negotiability*,' attaches to it, adding to its value, and if the owner in any form clothes another with the apparent title and the consequent power of disposition, inducing third persons to deal with him as owner, such persons are entitled to full protection — to the same measure of protection

extended to the *bona fide* taker of negotiable or commercial paper."

Nelson vs. Owen, etc., 113 Alabama, 372, 379.

"The stock certificates \* \* \* were the mere evidence of the ownership of shares in the corporation.

"It is well settled that such certificates are not negotiable.

"The assignee takes them subject to all the equities which existed against the assignor. They are choses in action."

Young vs. South Tredegar Iron Co., 85 Tenn., 189;

4 Am. St. Rep., 752; 2 S. W., 202.

Opinion by Mr. Justice Lurton.

Citing, Cormick vs. Richards, 3 Lea, 1.

**Limited negotiability affects lost or stolen certificates.** — "The holder of stolen certificate can claim no equities."

Spelling on Private Corporations, sec. 516.

The rule concerning lost or stolen paper does not apply to certificates of stock; for while it seems that such certificates have been from force of circumstances and of necessity clothed with some of the attributes pertaining to commercial paper, the certificate differs from the commercial paper in the above regard.

Cook on Corporations, sec. 358.

In

Spelling on Corporations (New York, 1892), Vol. I.,

p. 339, sec. 312,

it is said that

"The certificate only constitutes proof of property which may exist without it. \* \* \* One of the clearest distinctions between certificates of stock and promissory notes, with regard to negotiability, is the fact that when the latter have been indorsed in blank and one who has stolen or found them delivers them to a purchaser without notice of the theft, the latter acquires a title as against the payer or prior endorser; but the transfer of shares rests essentially and exclusively on contract, and a purchaser from a thief or finder of a certificate endorsed in blank acquires no title, nor does a subsequent purchaser from him, either as against the owner or the corporation."

*Ibid*, p. 575, sec. 521, Citing, *Anderson vs. Nichols*, 28 N. Y., 600,

*Barstow vs. Savage Mining Co.*, 64 Cal., 388.

*Biddell vs. Bayard*, 13 Pa. St., 150.

"The authorities are clear in support of the view that a certificate of shares of stock in the ordinary form is not negotiable paper and that a purchaser of such certificate, although endorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority to make the sale."

*Ibid*.—Citing, *Mechanics' Bank vs. N. Y. & N. H. R. Co.*, 13 N. Y., 599.

*Shaw vs. Spencer*, 100 Mass., 382.

*Barstow vs. Savage Mining Co.*, *supra*,  
and other cases.

See opinion of Mr. Justice Somerville of the Supreme Court of Alabama in

East Birmingham Land Co. vs. Dennis, *supra*.

Regarding the imperative need which alone can compel a relaxation of the rules of law, in order to conform with commercial usages, customs and necessities, it has been said with good authority:

"That no usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulation of a contract."

East Birmingham Land Co. vs. Dennis, 85 Ala., 565 (1889).— Citing, "Stock and Stockholders," 26 Am. and Eng. Encyc., 2d Ed., 830, and cases cited therein.

In delivering the unanimous opinion of the court in Knox vs. Eden Musée, 148 N. Y., 441,

Chief Judge Andrews said, in substance: That rightful ownership in a lost or stolen certificate might be asserted even against *bona fide* purchasers; and again, that the "rigid" rule of the common law of England prohibiting the assignment of choses-in-action was, at an early day, relaxed to some extent to conform to the usages of merchants and the necessities of commerce. This case, on account of its importance as an authority, has been already quoted herein, and should be read with care.

It thus appears that such relaxation of the common law rule began at an "early day" and has continued

since. The above authority recognizes not only the power, but also the duty of the courts so to interpret existing laws and so to administer them as to meet the requirements of business exigencies and commercial intercourse—so long as they are in substantial accordance with the rules and principles of equity and the furtherance of justice. And, furthermore, it is clear that this relaxation of the common-law rule allowing stock certificates to a greater or lesser extent to be clothed with the elements or attributes of negotiable paper was not intended to establish the rule that they were the stock itself, or that the rules regarding negotiable paper were, in general, applicable to them. The rule of the common law remains what it was and these certificates remain evidences of ownership, *i. e.*, mere vouchers.

**General remarks.** — It is “passing strange,” after all that has been said upon the subject of “stock certificates,” their negotiability, and how far the principles and rules governing commercial paper apply thereto, that a simple statement of the situation nowhere appears. Perhaps the following will supply the *desideratum*:

The stock certificate represents the interest of the owner of certain shares in the corporation. This interest is incapable of manual delivery, even as choses-in-action cannot be physically handled or transferred. The stock certificate might be likened unto the key to a house which in certain instances is delivered as representing the house itself. So, in the case of the trans-



fer of stock, the buyer pays to the seller the purchase price or other consideration, receiving in token of the transaction the "certificate," which is a symbolic delivery of the interest of the seller.

The entry of such transfers in the books of the corporation being a mere matter of *manège* and convenience, the corporation has, of right, the power to prescribe certain reasonable and proper rules and regulations in regard thereto. He who becomes the owner of its stock is presumed to know this reserved right; and he tacitly agrees to the same.

The benefits of this proper and wholesome view have been shown in the able opinion of Mr. Justice Davis, in

Bank vs. Lanier, 11 Wall. (U. S.), 369, *supra*.

The whole matter concerning the negotiability or non-negotiability of stock-certificates may be thus summed up, viz. :

*First.*—The stock certificate is not *per se* a negotiable instrument; nor is it governed, strictly speaking, by the principles, rules and practice pertaining to such instruments—it is a mere evidence of ownership—a voucher.

*Second.*—The exigencies of business and the facilitation of commercial intercourse, which in a way constitute public policy, have, however, caused the courts to permit these certificates to be clothed with some of the elements and attributes of "negotiable paper."

*Third.*—Such certificates are clothed with the distinctive features of negotiable paper so far as justice and equity require, and no further.

*Fourth.*—No general rule being applicable to every case, the courts must adjust and apply thereto the rules governing negotiable paper, according to the facts and circumstances embraced in the particular situation.

## CHAPTER XII.

### On Change of Capital Stock.

**Importance of subject. — No inherent power to make change. — Authority from legislative act must appear. — Reasons for rule stated.**

**Importance of subject. —** Among the questions of corporate management which have received a large amount of attention in our courts, has been that concerning the power of a corporation to change the amount of its capital stock, whether by increasing or decreasing the same. It cannot be attempted, however, in this work to give more than a brief outline of what has been authoritatively said on the subject.

**No inherent power to make change. —** The consensus of opinion holds that, of itself, the corporation is bound to exist within the limits of the capital-stock with which it began its existence. That the capital stock of private business corporations is sometimes decreased and more often increased, is true; but the ability to effect such change is not derived from any inherent right which such corporation possesses. Its authority must be derived from the Sovereign power which is the source of its being.

**Authority from legislative act must appear. —** Chief Justice Brickell, of Alabama, a high authority, in

Granger's Life and Health Ins. Co. vs. Kampers, 73 Alabama, 325, has this to say:

"When a corporation relies upon a grant of power from the legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise as it is to the particular thing to be done,—(citing, Angel and Ames on Corporations, sec. 111). "If in the mode prescribed by the statute the capital stock was not increased, the statute would furnish no authority for the increase. \* \* \* A controlling purpose, as we suppose, in authorizing or in compelling the creation of private corporations under the general laws, is to secure uniformity and equality of corporate powers, functions and privileges; that all corporations of the same class, formed for like purposes, should enjoy the same franchises and privileges. Unless it was intended to work a radical change in the nature and character of these artificial beings, the mere creations of the law, and to subvert the whole theory which had prevailed in reference to them, it cannot have been contemplated that they should for themselves create powers and privileges by declaration or reservation, whether the declaration or reservation is expressed in the articles of incorporation or in the constitution or by-laws ordained by the incorporators for their government. Such declarations or reservations would soon become more liberal and diverse than was the liberality and diversity of the grants of corporate power by special legislative enactment—the evil it was intended to remove. \* \* \* The power must be found in the

law from which corporate existence is derived, or must have been conferred by a subsequent law, the provisions of which were observed in the exercise of the power."

The whole of the foregoing decision, if space permitted, would be given here, as it contains much valuable matter which will repay careful perusal.

"Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character and cannot, on general principles, be made without the express or implied consent of the members. \* \* \*"

*Railway Co. vs. Allerton*, 85 U. S. (18 Wall), 233; opinion by Mr. Justice Bradley.

"And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed by its charter, and that all attempts to do so are void."

*Scoville vs. Thayer*, 105 U. S., 143,—Citing, *Mechanics' Bank vs. N. Y. & N. H. R. R.*, 13 N. Y., 599. *N. Y. & N. H. R. R. vs. Schuyler*, 34 N. Y., 30. *Ry. Co. vs. Allerton*, 18 Wall (85 U. S.), 233. *Stace & Worths Case*, Law Rep., 4 Ch. App., 682, note.



"Joint stock corporations cannot have, apart from statutes, a power to vary the amount of their capital."

Brice's *Ultra Vires*, sec. 110.

**Reasons for rule stated.** — In the United States Supreme Court (1873) Mr. Justice Bradley, in delivering the opinion of the court, said:

"The rule that a power not clearly conferred must be deemed to be withheld is an admitted canon in the interpretation of private charters of incorporations.

\* \* \*"

"We are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a stock corporation beyond the limit 'fixed' by the charter cannot be made by the directors alone unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a construction of the body itself or to an enlargement of the general stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased except in the manner expressly authorized by the charter or articles of association. Authority to increase the capital stock may undoubtedly be conferred by a law

passed subsequent to the charter, but such law should regularly be accepted by the stockholder. \* \* \*

“Changes in the purpose and object of an association, or in the extent of its constituency and membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members.”

“The reason is obvious,—

“First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

(*Susquehanna Boom Co. vs. Dubois*, 58 Penn. St., 185.)

“Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it they could always perpetuate their own power.

“Their agency does not extend to such an act, unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not

bind the stockholders without their acceptance of it, or assent to it, in some form."

Railway Co. vs. Allerton, 85 U. S. (18 Wall), 233.

Since the authorities above quoted seem sufficient in number and weight to establish the principles included in this chapter, we will now turn to the rights and powers of stockholders, when assembled and acting as a corporative body.

## CHAPTER XIII.

### Stockholders' Meetings.

Stockholders' meeting is corporate legislature. — Distinctive features of this chapter. — Plan includes epitome of treatment by distinguished authors. — Nature and requirements of meetings. — Clark and Marshall. — Angel and Ames. — Potter. — Cook. — Morawetz. — Thompson. — Spelling. — Bouvier. — Waterman. — Blackstone. — Kent. — Brice.

Stockholders' meeting is corporate legislature. — Whatever may be done by corporations relates back to some lawful meeting of the stockholders.

It is at such place and time that the aggregated members of the corporation become the corporate entity, equipped and ready for the consummation of its business.

It is true that of the multitude of things done by corporations comparatively few are actually performed at its meetings; but the primary power and authority of directors, officers and agents—though the authorization may be sometimes remote—will be found to have been conferred on them at, and to have its source in, such meetings.

In fine, it is the only way whereby the power of the corporation can primarily be exerted. To extend the similitude of the Business Stock Corporation with a free government hereinbefore spoken of, it may be said that in a republic, the people are the sovereign power; in the people exist all power and authority. Of this they delegate to the legislature so much as they deem it proper to relinquish for the time. This delegation is made at duly convened meetings, called elections, and it is at such times and places alone that the Sovereign People, notwithstanding they are all-powerful, consent to act in regard to governmental affairs. So with stockholders, who, in regard to their relations to the corporation, occupy a highly analogous position.

Stockholders, when regularly assembled, are qualified to and do part with and delegate to the corporate officers the authority with which the latter conduct its affairs, and this power is only exercised at such meetings. The analogy does not cease here, for as in the decision of matters political, so here the majority of voting power prevails. There are, however, some modifications of this rule, which will appear later in this chapter.

Distinctive features of this chapter. — In one particular this chapter differs from every other.

Elsewhere the supply of excellent material contained in the writings of each author has been drawn upon as occasion seemed to require.

In this chapter, however, a different policy has been adopted.



Plan includes epitome of treatment by distinguished authors.

The supreme importance of treating lucidly and understandingly of the fountain-head of corporate energy, viz.: "Stockholders' Meetings," has seemed to offer an opportunity to change the general plan in a way that will prove of service here.

As will be seen, the ideas of each distinguished author among those selected, will be presented *seriatim*, and at such lengths as the limits of this book permit; with the advantage, it is believed that these ideas when thus offered fresh from the intellectual mint will prove more useful and convincing than when recoined in any other form.

While this course has entailed the addition of some further pages to the text, it is confidently believed that neither apology nor excuse is required for such extension.

**Nature and requirements of meetings.** — One of the most inalienable rights of stockholders is to attend and participate in these meetings, and this right carries with it the right of notification, for notice must be given, or attempted to be given, to every stockholder. In order to make this matter clear it is necessary to enumerate the different classes of stockholders' meetings which exist. They are as follows: Regular or Stated, and Special. The Regular or Stated meeting is fixed by law or regulation; the Special is called according to forms and methods adopted by the corpora-

tion. Of the former class the stockholder is supposed to know because it is a matter of record; of the latter, he must have special and direct notice. But the stockholder must have notice in some way of all meetings, whether of the one class or the other. In most instances the corporate by-laws provide for these notices, and if reasonable they are controlling.

Under the head of "Locus" and "Domicil," it is shown at a later place, that the meeting, unless some statutory authority appears to the contrary, must be held within the confines of the creating State.

A large part of the litigation in which the question of meetings has come up is in regard to notice, although the question of the power of the majority has also received attention.

In regard to corporate meetings, the following general rules apply:

Meeting must be called by authority and in the manner prescribed by the charter.

Saving express provisions to the contrary, a meeting may be called whenever the directors or managers deem it necessary.

Irregularities in calling meetings are waived when the objecting stockholder has in any manner estopped himself from calling that matter in question.

Meetings may be compelled by mandamus in proper cases.

Notice of meeting is not necessary unless expressly

required, if the time and place is fixed by charter, by-laws or usage.

If not so fixed, each stockholder is entitled to notice. And if it be for a special purpose, information of the object of the meeting should be included.

Meetings must ordinarily be held at time and place specified by the general or special laws governing, but this does not preclude other meetings, when exigencies arise.

Meetings, in general, must be held within the territorial limits of the corporation, but may be effective outside by force of estoppel.

Meetings must conform to the charter and the statutes applicable thereto.

In absence of provisions as to quorum, any number of stockholders exceeding one may legislate. This matter of "quorum," however, is in practice provided for either by charter or statutory enactment.

In the absence of provisions to the contrary, a meeting may be adjourned to any other time by a vote of a majority.

**Clark and Marshall.**—The presumption in case of a meeting is that the same was properly held and, in short, was competent.

Clark and Marshall on Corporations, Vol. III., sec. 644, pp. 1960-1961.

Action by stockholders as individuals, although embodied in a written instrument signed by a majority, is not corporate action, and is therefore void.

*Ibid*, sec. 645.

Powers of stockholders are limited and confined to their actions as members at a duly called, etc., meeting; outside of that they are *nil*.

*Ibid.*

Stockholders acting as above may be estopped from denying responsibility; otherwise, business transacted at an irregular meeting is impotent to bind the corporation.

*Ibid.*

In general, the same rule which obtains in all matters affecting the performance of statutory provisions, to wit, careful adherence to the statutes in letter and form as well as in spirit attaches to all corporate actions. In other words, whatever in regard to corporate matters is to be done at its meetings, including the calling and institution of the meeting, must be in strict adherence to the laws obtaining and in force at that time.

*Ibid.*

The acts of a meeting irregularly called or lacking some one or more of the requirements of law may be ratified and made effective by subsequent acts of the stockholders.

*Ibid.*

A substantial compliance with the law is only required. In absence of proof to contrary a meeting is deemed to be properly and lawfully held. The remedy to aggrieved stockholders in all matters pertaining to meetings is through the courts by mandamus.

*Vide* Bill of Equity, etc.—*Ibid.*

The fixing of time and place to be effective must be by—

1. Charter;
2. Statute;
3. Notice.

Notice of the hour is imperative. This appeals to reason and common-sense; for who would care to await the holding of a meeting for twenty-four hours?

Fraud in regard to meetings of stockholders is as malignant and subversive here as elsewhere, and the fraudulent concealment of notice of a meeting from a stockholder is good and meritorious ground for setting aside the "doings" at such meeting.

It is not in a strict sense essential that the notice should be in any prescribed form. The gist of the whole thing is that the stockholder should be creditably informed how, when and where a meeting of the stockholders is to be held; and what, if any, particular thing out of the ordinary would or might come up. And the object of this rule is to afford the share-owner an ample opportunity to protect himself and his interests. To this every stockholder is entitled, and if he does not receive it his interests are not involved, or rather a court of equity will not permit them to be involved or affected by any action taken thereat.

The above seems to be an epitome of what the stockholders' rights are in the premises.

The various rules and provisions usually contained in by-laws as to "special" business to be transacted,



exist for the purpose of enabling the stockholder to protect his interest.

Ibid.

So far as the ordinary or current and usual affairs of the corporate body are concerned, the stockholder may be willing to rest satisfied with anything the board of directors may do; at the same time, there are many things out of the ordinary which he might wish and be able to successfully oppose. In this right to notice the stockholder is fully sustained by the courts.

Previous notice of meeting may be waived—or not having been given and received or waived, may be rendered of no importance by the subsequent notification of the stockholder entitled to notice and not having received the same.

Ibid, sec. 647.

Or if a stockholder has not received any legal notice, yet hears of the meeting and is present at it, he is in general estopped from disputing its propriety or legislative ability.

Ibid.

Yet there may be cases where a stockholder not lawfully notified, yet present, may successfully oppose the action of such illegally summoned meeting. But in such case equity would require the objecting stockholder to show how he had been damnified by failure of the proper authorities to give the required notice, etc., etc. In the absence of such proof it might be a case of *damnum absque injuria*.

As has been said, meetings held in the usual manner, etc., are deemed or presumed to have been properly and legitimately called.

Ibid.

Meetings to be effective must be in the confines of the creating State. The corporation cannot act beyond these confines.

Ibid, sec. 648(d).

And herein the books show a distinction between the act of the corporate body itself and the acts of its duly authorized and empowered agents and servants; it being laid down as a rule governing the situation—

(a) That a corporation cannot conduct its affairs without the confines of its home State without statutory permission.

(b) But it may within such confines authorize and empower its agents and servants to act without such confines. See Ibid, sec. 648(d).

Meetings of stockholders should

*First.*—Be in accordance with the by-laws, which should in turn be consistent with the charter.

*Second.*—In accordance with the laws of the sovereignty or State creating the corporation.

*Third.*—In the absence of special law or regulations, the requisites of a proper and valid and effective meeting are:

(a) It should be conducted by the proper persons.

(b) It should proceed with fairness and good faith to all entitled to participate, and in such a way as to

enable them to express their opinion and vote effectively (*pro tanto*) on all questions submitted.

*Ibid.*, sec. 649(*b*).

A meeting improperly and fraudulently held cannot effectively act, and a court of equity will, on the application of an aggrieved interested person, intervene.

*Ibid.*

Meetings are of two kinds, viz.: General or Stated, and Specially Called.

At General or Stated Meetings all regular business can be transacted; but no special or extraordinary business can be done thereat, excepting such as is contained in the notice duly and lawfully given to the stockholders.

At a Special Meeting no business whatever can be lawfully transacted other than that of which the stockholders have had due and lawful notice.

*Ibid.*

The by-laws usually provide as to all these meetings, both General and Special, and describe in detail what may and may not be done thereat.

A stockholder may change his vote at any time before the result is announced.

*Ibid.*, sec. 649(*c*).—Citing, *State ex rel Lawrence vs. McCann*, 64 Mo. App. 225.

After inspectors have received unchallenged vote, they cannot reject it as illegal.

*Ibid.*,—Citing *Hartt vs. Harvey*, 32 Barb. (N. Y.), 55.

Individuals may hold their positions notwithstanding

ing frauds, etc., which did not effect their election, although connected therewith to a minor extent.

State ex rel Redd vs. Smith, 15 Oregon, 98.

The method of voting is generally prescribed by charter or by-laws. If so, such provisions must be strictly followed.

Voting, unless provided for as above, may be *viva voce*, by ballot, or by the uplifted hand; and in any event if such manner of voting is used, and it is not objected to by anyone, it is valid.

Ballots are not required to be of any peculiar form, unless it is so provided as above by the by-laws, etc.; they must, however, be such as to clearly show the intention of the voter.

Voting after prescribed hours is valid; *semble*, if polls are opened to let in a tardy voter; but after the count and announcement no ballot or vote will be considered.

Ibid (Clark and Marshall), sec. 649.

Presumptions of law favor a fair and honest election.

There is a distinction observed between other meetings and meetings of directors, and in a board of directors a majority of members is necessary to form a quorum.

But this is not the case with stockholders; for in the absence of expressed provision any number

present more than one may transact business at a duly and lawfully called meeting.

*Ibid.*,—citing with many other cases:

*Ex parte Willcocks*, 7 Cowen (N. Y.), 402.

*Craig vs. First Presb. Church*, 88 Pa. St., 42;

*Brown vs. Pacific Mail S. S. Co.*, 5 Blatchf. (U. S.),

525.

But although there may not be a sufficient number present to transact business, they still have power to adjourn the meeting.

*Ibid.*,—citing:

*Ellworth Woolen Mfg. Co. vs. Faunce*, 79 Maine, 440;

*Weinburgh vs. Union St. Ry. Adv. Co.*, 55 N. J. Eq.,

640;

*Franklin Trust Co. vs. Rutherford Boiling Spa. Co.*,

57 N. J. Eq., 42;

*Rutherford Boiling Spa. Co. vs. Franklin Trust Co.*,

58 N. J. Eq., 584.

See also:

*Ex parte Rogers*, 7 Cohen (N. Y.), 526, 530, Note.

Majority may subsequently ratify and make valid the acts of a minority meeting.

*Ibid* (Clark and Marshall, *supra*), sec. 715.

The presumption of law in regard to a meeting is that a quorum was present.

*Ibid.*

In fact, the presumption of law in regard to the legality, regularity and validity of corporate meetings are all favorable thereto; thus practically placing the *onus probandi* upon the stockholder—whether “attack-



ing," "dissatisfied," or the like. This rule of law is most certainly correct and proper.

Stock owned by the corporation itself (called commonly treasury-stock) must not be counted as present or voting.

See

Greene vs. Seymour, 3d Sandford Ch. (N. Y.), 285.

Where a court cannot see a fraudulent or dishonest intent or purpose it will not interfere with a majority of the stockholders agreeing among themselves as to running the corporate business and affairs.

See:

Thompson on Law of Corporations, Vol. IV., sec. 4447 *et seq.*

Gregory vs. Patchett, 33 Beavan, 595; and

Atwoll vs. Merryweather, law R., 5 Eq., 464; Note.

"The law wisely condemns all contracts \* \* \* which tend to influence the majority of stockholders to fulfil their own natural desire and inclination against the other stockholders."

See:

Wilbur vs. Stopel, 52 Mich., 344.

See also Clark and Marshall, p. 1972-3-4, etc., for a careful discussion of this subject *in extenso*, *i. e.*, as to place where corporate meetings may be held.

Also, Angel and Ames, sec. 498—holding all proceedings outside of domicile State are void.

The action of a meeting of stockholders of a corpo-

ration is the action of the corporation and not of the individuals composing it.

In

Sellers vs. Greers, 172 Ills., 549, etc.,  
it is held (syllabus), that—

“The property of a corporation is not subject to the control of its members or stockholders, and a contract by a stockholder to sell or dispose of the corporate property, not authorized or ratified by the corporation, has no binding effect.”

Opinion of the court by Craig, J. (1898).

*Ibid.*

Records of all meetings should be properly kept and recorded, and if duly attested are evidence; but such records are not essential to the validity of the acts done unless specially required by charter, by-law or statute, and parole evidence is competent to prove what was done.

*Ibid.*

Of the persons who are entitled to vote, the following rule is laid down in Clark and Marshall, sec. 653, subdivision “a”:

“In the absence of express charter or statutory provision to the contrary, the general rule is that every member of a corporation not having a capital stock, and every legal owner of shares in a stock corporation, has a right to be present and vote at all corporate meetings.”

As to who are owners of stock and thus entitled to

vote, the books of the corporation are *prima facie* evidence.

Ibid.

Again, the above authors at sec. 653, subdivisions "b" and "f" state in effect:

A certificate is not necessary to constitute one a stockholder, and the right of a person who owns stock to vote the same is not affected by the fact that no certificate has been issued to him, or, if it has, by his failure to produce the same.

Ibid.

While stockholders have certain rights and privileges and powers which they can exercise at meetings, they may at the same time surrender or restrict their power to vote by agreement, by consenting to by-laws or otherwise,—provided the agreement does not violate any charter or statutory provision, and is not contrary to public policy.

Ibid.

"Majority stockholders, however, as we have seen, will not be allowed to control the corporation in the interests of themselves individually and in fraud of the rights of the minority."

Ibid, sec. 653, subdivision "o."

This question will be discussed in Chapter XVI., "Stockholders Inter sese," *post*; particularly as to duties of the majority toward the minority—the most fruitful source of corporate litigation. See also Chap-

ter XVII., and the text generally of the succeeding chapters.

The common-law rule was that all persons should be present in person.

Ibid.

Rule relaxed by charter, by-laws and statutory enactment.

Ibid (Clark and Marshall).

Angel and Ames. — Angel and Ames, Chap. XIV., secs. 487, *et seq.*, in substance say :

That the principal points regarding corporate meetings are—

- (1) The mode of convening;
- (2) The place of meeting;
- (3) The number of members and officers required to be present to render their acts valid.

Wilcock on Municipal Corporations, sec. 58, says :

All corporate affairs must be transacted at an assembly :

- (1) Convened upon due notice;
- (2) At a proper time and place;
- (3) Consisting of the proper number of persons;
- (4) The proper officers.

The foregoing was approved in *People ex rel Loew vs. Batchellor*, 22d N. Y., 128, 134. Opinion by Selden, J.

Business which may be transacted at a meeting of the corporation may also be legally transacted at an

adjournment of such meeting; and no new notice is necessary.

The principle that the actions of an adjourned meeting is as valid as if done at the original meeting was discussed in the celebrated English case of *Scadding vs. Lovant*, 5 Law and Eq., 16, House of Lords, July, 1851.

The lord high chancellor, in answer to Lord Brougham, said:

"Does not the same authority continue from day to day if the business is declared not to be concluded, as from hour to hour in the same day? Suppose we were to adjourn now for a quarter of an hour, would it not be the same meeting when the House resumed its sittings?"

See:

*Warner vs. Mower*, 2 Vermont, 385.

*Smith vs. Law*, 21 N. Y., 296, is to the following effect in head-note:

"The by-laws of a corporation having nine directors established certain days for regular meetings and provided that when at such a meeting less than a quorum, but three or more directors, should be present, they should have power to adjourn to any time prior to the next regular meeting: Held — that five directors, or a majority of them, at such an adjourned meeting may exercise the ordinary corporate powers, although the absentees have no other notice of the meeting than that with which they are chargeable from the by-laws."



The reported case sustains the syllabus.

Upon some of the questions in the case not affecting our subject there was some difference of opinion among the judges sitting; but—

“The court, however, concurred in affirming the general powers of the directors at the adjourned meeting to exercise the corporate powers.”

Comstock, C. J., with Bacon, J., wrote the opinion; Welles, Selden, Denio, Davies, Clark and Wright, J. J., concurred.

A legal meeting of the stockholders may be had where all of the stockholders are present, and consent.

Angel and Ames, secs. 491-2; also, sec. 495, to effect that

Meetings must be by personal notice, unless some other provision therefor is made by law or charter.

Notice must be given a reasonable time before the meeting; reasonable time depends upon circumstances.

Ibid, sec. 494.

All corporate affairs must be transacted at an assembly convened upon due notice.

See *People ex rel Loew vs. Batchellor*, 22d N. Y., 128, *supra*; opinion by Selden, J., approving Angel and Ames and Wilcock on Municipal Corporations.

The same rule applies to private corporations.

Ibid.

In absence of contrary charter provisions, “corporations are subject to the emphatically republican principle that the whole are bound by the acts of the ma-

jority when those acts are conformable to the articles of the constitution.

Angel and Ames, sec. 499.

It is to be remembered, however, that the will of the majority must not be oppressive or injurious to the minority.

See this subject, Chap. XVI., "Stockholders Interests," *post*.

Also Chapters XIX. *et seq.*, covering generally the topic, "Stockholders' Rights and Wrongs."

The rule in regard to the management of corporations is purely democratic, in that the will of the minority must yield to that of the majority, within the limits stated.

**Potter.** — "Though a corporation is distinct from the individuals composing it, yet being intangible it can transact its business and manifest its wishes only by and through these individuals. Consequently, meetings of the members have to be held from time to time for the various purposes connected with the corporation. At all meetings every member has a right, apart from provision expressed or implied to the contrary, to be present. Notice must, therefore, in some way or other, be given to each person entitled to be present; the omission of such notice to anyone, though he may have given a general dispensation of notice, and though the omission be accidental, will invalidate the proceedings at the meeting. Though all members have primarily a right to receive notice and to attend, yet the statute,

charter, custom, or the by-laws of the corporation may restrict the number having this right; but restrictive by-laws, which are repugnant to the charter, or statute instruments or otherwise, will be invalid."

Potter on Private Corporations, Vol. I., Chap. XIII., sec. 336, p. 417; citing:

People ex rel Loew vs. Batchellor, 22d N. Y., 128.

People's Mutual Ins. Co. vs. Westcott, 14 Gray (Mass.), 440.

State vs. Ferguson, 2 Vroom (N. J.), 107.

In People vs. Batchellor, *supra*, Judge Selden delivered the opinion of the court, and cited Scadding vs. Lorant, *supra*:

"We think that notice so given extended to all the adjourned meetings, such adjourned meetings being for the purpose of completing the unfinished business of the first meeting and being in continuation of that meeting."

The decision in this important case (People vs. Batchellor), also contains the following, p. 134:

"It is not only a plain dictate of reason, but a general rule of law, that no power or function entrusted to a body consisting of a number of persons can be legally exercised without notice to all members composing such body."

The learned judge cites Wilcock on Municipal Corporations, sec. 58, and Angel and Ames, Chap. XIV., sec. 1, and in confirming the necessity of notice, adds: "*\* \* \** and as the reason of the rule, so no doubt

the rule itself, applies with equal force to all aggregate bodies, although unincorporated."

Parties present and not objecting cannot afterward dispute regularity, etc.

Potter on Private Corporations, sec. 337.

The rule of the courts of England as to service of notice of corporate meetings has been adopted in this country, both by statute and our courts.

Potter on Private Corporations, sec. 342.

A marked distinction is noted between "General" and "Special" Meetings,—

Citing, Warner vs. Mower, 11 Vermont, 385.

**Cook.**—"Stockholders of a corporation are the origin, existence and continuance of the corporation itself.

"They elect the directors and control the general policy through them.

"These vital powers can only be exercised in corporate meetings. Therefore, method of calling time and place of meeting, notice to be given and other incidents, are of great importance."

Cook on Corporations Vol. II., sec. 588, p. 1268.

Meeting should be within boundaries of the State creating the corporation, although through agents the company may transact business in another State.

Ibid, sec. 589.

The above author notes the fact that there is a dif-

ference of opinion as to the effect of business transactions without the domicil State.

*Ibid*, citing,—*Craig Silver Co. vs. Smith*, 163 Mass., 262, 265 (1895),

in which the question is fully discussed and numerous authorities are cited.

From all of the above and other authorities the rule would seem to be:

*First*.—That as an aggregate body a corporation can act only within the confines of its domicil State.

*Second*.—It may, however, act without such limits, by or through its duly authorized agents.

One interpretation of the above rule gives the corporation power to act in as many States as have recognized it through the act of incorporation.

On failure of the proper party to call meeting, court will compel it by mandamus.

Cook on Corporations, sec. 593.

Three things are necessary for a notice of meeting: 1, Time; 2, Place; 3, Business to be done.

*Ibid*, sec. 595.

The right of stockholders to elect directors is absolute and imperative, and cannot be taken away.

*Ibid*, sec. 603.

The powers of stockholders at meetings are:

(a) To elect directors (or trustees) and thereby direct the policy of the company.

(b) In the first instance make by-laws and thereafter amend them, etc.



(c) Continue or dissolve the corporation.

Ibid, sec. 602.

Meetings must be held at the prescribed hour and in the proper place.

Time and place must be reasonable.

Ibid.

In the matter of election of directors:

It may be said that such election must be in accordance with the charter, by-laws and general laws on the subject.

In the absence of these provisions the election must be conducted according to the sound discretion of those in charge.

Ibid, sec. 605.

And it is to be herein noted and remembered that the object of the election is to afford every stockholder an opportunity to express his wishes; and that in the exercise of this right he will be fully protected. Insignificant technicalities will not be allowed to disturb vested rights in the premises.

The foregoing applies to all matters connected with stockholders' meetings.

Morawetz. — Morawetz, on the subject of stockholders' meetings, has this to say concerning majority-control, viz., that it is an implied condition in the formation of every association of this character that the majority of members present at a shareholders' meeting shall have authority to bind the whole association by vote. The extent of the power of the majority to

act for the body corporate is measured by the charter itself. Each and every shareholder contracts that the will of the majority shall govern in all matters coming within the limits of the corporation.

Morawetz on Corporations, sec. 474, etc.,—citing  
Dudley vs. Kentucky High School, 9 Bush.  
(Ky.), 578.

See also sec. 641 of the same work, as follows:

“Every act of an association, whether incorporated or not, must necessarily be the act of all the members who compose the association. \* \* \*

“Every member of such an association impliedly agrees that a majority shall have power to bind him by their vote, so long as they act within the express or implied terms of the charter. \* \* \*”

The deduction from all the foregoing is that the majority shall govern.

But at the same time it must not be forgotten that common-sense, equity and justice step in here and limit the otherwise illimitable power of the majority, even within the statutory confines of charter and by-laws, and say that there are certain duties which one stockholder owes to another which must not be transgressed or laid aside.

See herein, particularly on subject of duties, Chapter XVI., “Stockholders’ Inter-sese,” *post*.

Shares owned by the corporation have no voting qualities. Treasury shares are a mere “fiction.”

*Ibid* (Morawetz), sec. 478.

Where charter or by-laws fix time and place for meetings other notice is unnecessary; otherwise every stockholder is entitled to reasonable notice.

Ibid.

The right to vote belongs to the shareholder. \* \* \* This right may be restricted by legal holders of equitable obligations to third persons.

"Thus a shareholder who had made a complete sale or assignment of his interests in shares has no right, as against his assignee, to vote upon them without the consent of the assignee, although a regular transfer may not have been executed on the company's books."

Ibid, sec. 483.

The consensus of opinion is that the actual *bona-fide* owner is the one entitled to vote; but in case the company has not yet received and recorded in its archives, official notice of the fact of ownership, he must produce satisfactory proof of such ownership. This rule also holds good in regard to the bringing of actions by stockholders.

Corporate elections held without the domicil State were declared wholly void by the Supreme Court of Maine in *Miller vs. Ewer*, 27 Maine, 509; citing, *Freeman vs. Mechias Water Power Co.*, 38 Maine, 345 and 46 A. M. Dec., 619.

Waterman on Law of Corporations, sec. 62.

But see *Capp vs. Lamb*, 12 Maine, 312, 314.

Meetings must be within the State.

**Thompson.**—See Thompson, Vol. I, sec. 696.

As to who may call meetings—this authority is usually provided by charter or by-laws. In the absence of such provision the court will, upon application, grant mandamus for the purpose.

Thompson, *supra*, secs. 704, 705.

Notice must be had by stockholders; presumptive notice is sufficient for so-called stated meetings; otherwise actual notice is required, and all are entitled thereto.

*Ibid*, sec. 708.

Requisites of notice are:

1. Authority to call;
2. Time and place;
3. Business to be done.

*Ibid*, sec. 710.

As a rule, the majority governs.

*Ibid*, sec. 725.

**Spelling.**—Spelling treats of this subject with great learning and clearness:

“The members of a corporation in meeting assembled are not the corporation; and yet, as its directing and governing agent, they are limited in their power over it only by charter and general law. \* \* \* As long as no mandatory provision of law, the charter or by-laws is violated, the members may conduct a corporation meeting in any manner convenient and agreeable to themselves. No particular formalities are required, and mere irregularities are unimportant,

provided the sense of the meeting is fairly expressed. In order to be of any avail to members present, they must object to, and enter protest against, irregularities at the meeting, if aware of their occurrence."

Spelling on Private Corporations, Vol. I., sec. 370, p. 402.

"The rule that agents for a corporation shall not exercise its authority in its own interest, at the expense of the membership, has no application to them when assembled in a corporate meeting for the purpose of voting, unless they corruptly sacrifice the interest of the corporation for their own gain. As long as they act in good faith and with due diligence, members may elect themselves and constitute themselves agents of the corporation and thus control its business and funds. But there is a point of abuse, at which courts will interfere, even with the privilege of voting. If the majority attempt to appropriate the corporate funds to their own use, or to direct the business to objects not contemplated in the charter or incidental to its lawful objects, courts will administer preventive relief to an aggrieved shareholder."

*Ibid*, sec. 377.

"It is an implied condition in every contract of membership in corporations for profit that a majority in point of interest and in point of numbers in every corporation shall control its operations and its funds. \* \* \* But the rule is subject to the limitation that no majority, however large, can misapply the funds or divert the operations of the corpora-



tion aside from or beyond the chartered purposes or agreements of association, or in total disregard to the formalities prescribed by law or the articles, so as to bind a dissenting minority."

Ibid, sec. 371.

"It is only when the entire collective interest is ignored or disregarded, or when the majority, or the agents they may have selected, pervert the corporate machinery to their individual interest, or to purposes and objects other than those for which the corporation was formed, that the minority have a right to complain or have any right to appeal to the courts. \* \* \* Courts of equity are, in such cases, the minority stockholders' stronghold."

Ibid, sec. 373.

As has been shown, the stockholders are formed into a body corporate by the sovereign power of the State, acting through the charter, whether granted by special legislation or by general statute; and to the artificial body thus created are given certain powers, rights and privileges, and the ability to do or refrain from doing certain acts and things. This ability and those powers, rights and privileges belong to the stockholders and to each of them exclusively. Upon the formation of a corporation the stockholders part absolutely with their money or property, or in some cases with equivalent services, to the value (supposedly) of the shares of stock of which they become the owners; in exchange, however, they obtain certain rights, viz.:

(a) A right to a distributive share (*pro rata*) of

such of the money or property of the body or corporation as is not required for its present uses and purposes and can therefore be safely paid in dividends

(b) A right to take part in the management and control of the body, to the extent of saying what particular persons shall carry on its business operations.

These rights are exercised by means of the suffrages of the shareholders, and it is principally for elective purposes that stockholders' meetings are had.

There are, however, other classes of meetings, which will be enumerated in the proper place.

It is well to note again that all the powers of a corporation,—that is, those powers which the body may exercise by force of the charter, and in conformity with law, spring from the stockholders; and this original (if it may so be named) source of power comes to the stockholders by delegation from the Sovereign people.

In Massachusetts it is not necessary, in order to qualify as a member of a manufacturing corporation, that a party should have a certificate of his shares.

Chester Glass Co. vs. Dewery, 16 Mass., 94.

"A stockholder, who owns stock which stands in his name on the transfer books, may vote upon it, though, at the time, it may be hypothecated by him. And a trustee who holds stock for others may so vote." Note cites. *Ex parte Willcocks*, 7 Cowen (N. Y.), 402; *Ex parte Holmes*, 5 Cowen (N. Y.), 435.

The rule is stated to be in substance: In absence of special provisions the whole are bound by the acts of the major part of those who were present at a regular corporate meeting, whether the number present be a majority of the whole body or not.

**Bouvier.** — The foregoing are from Bacon's Abridgment, Vol. II., pp. 436 to 483, notes, etc., by John Bouvier.

(T. and J. W. Johnson, Philadelphia, 1860.)

The wishes of corporation, its internal policy and the general conduct of its affairs are ascertained and authoritatively expressed at meetings of stockholders held for that purpose, where are afforded opportunities for interchange of views and mutual discussion.

On such occasions,

"Officers must be appointed or elected, by-laws passed and vacancies filled, not to mention the numerous other proceedings calling for united action."

**Waterman.** — Waterman on the Law of Corporations, Vol. I., sec. 59, p. 197-8.

Notice to all is required.

Ibid, sec. 60.

Where meeting is "stated" every member is presumed to have notice.

Notice must be given to every stockholder of special meetings.

Stockholders should be informed of the purpose and object of special meetings, and also in case extraor-

dinary business is to be transacted at a stated meeting, stockholders should be pre-informed of it.

Corporations cannot migrate out of their home State.

*Ibid*, 62, *et seq.*

“\* \* \* Members are bound by acts of majority when such acts are conformable to the charter; each one having tacitly agreed to subordinate his individual will to the will of the corporate body ascertained according to law. The majority here means the majority of those who are present at a regular corporate meeting.”

*Ibid*, sec. 67.

Such was the rule of the Roman Law, *i. e.*, majority binds.

See Savigny's System of the Roman Law, Vol II., sec. 97, p. 329, and such has since become the law of the land.

Sec. 1, art. 3, p. 1441.

Domat's Civil Law, Vol. I., p. 568. (Little & Brown, Boston, 1850.)

The nomination of such governors and directors is made by a plurality of voices, when those who have a right to vote are assembled in the manner and in the numbers prescribed by the rules and custom of the community. \* \* \*

Waterman, *supra*, sec. 67, cites, Kenyon, C. J., in *Rex vs. Beeston*, 3 Term R., 592:

"The act of the majority binds the whole; so much so, that the court will compel the person who has the seal to affix it to any act according to the vote of the majority, though against the consent of that person."

Separate private acts of members are invalid, but usually provisions as to voting powers and qualifications are made by law. Power of majority may be limited and greater number required, *etc.*, *etc.*

*Ibid*, sec. 71, *etc.*

Although the legislature authorizes a fundamental change in original purpose of act of incorporation—any stockholder may object, because the relation between stockholder and corporation is one of contract, the obligations of which cannot, under the Constitution of the United States, be impaired.

*Ibid*,—citing a long line of cases.

**Blackstone.**—

"In aggregate corporations, also, the act of the major part is esteemed the act of the whole, \* \* \* but with us any majority is sufficient to determine the act of the whole body."

Blackstone's Commentaries, Book I., Chap. XVIII., Vol. I., p. 476 (Starswood's Ed., Phila., 1863).

Meaning of "Legal Owner":

"It is the object of statutory regulations to afford corporations a convenient test of the right to vote in cases of dispute between persons claiming ownership of its stock; and they are not bound to stop or delay proceedings in order to investigate the equitable rights



between pledgors and pledgees and trustees and cestuis-que-trustent.

(Citing, *Hoppin vs. Bufferin*, 9 R. I., 513.)

"The object of the stock-book, and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and to enable it to know who are entitled to vote. This is the recognized object of such provision, as decided in many cases."

Spelling, sec. 379.

*People ex rel Probert vs. Robinson*, 64 Cal., 373.

*Gilbert vs. Manchester Iron Mfg. Co.*, 11 Wendell (N. Y.), 628. . .

*Bank of Utica vs. Smally*, 2 Cowen (N. Y.), 770-8.

*Commonwealth ex rel Detwiler vs. Com.*, 131 Penn. State, 614.

*Hoagland vs. Bell*, 36 Barb. (N. Y.), 57.

**Kent.—**

"The same principle prevails in these incorporated societies, as in the community at large, that the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular corporate meeting."

Kent's Commentaries, Vol. II., Part IV., sub. 8, sec. 33, p. 293.

There is a difference between "stockholders' " meet-

ings and "directors' " meetings; all of the text-books herein cited note the difference, and the same rules do not apply equally to both. See Chapter XV., *post*, and places referred to in Index, for rules governing meetings of directors.

Brice. — The following, until otherwise noted, is from Brice's *Ultra Vires* (Stevens & Haynes, London, 1893).

(Reference generally is to pages as well as to sections. Some passages are given verbatim; others, in substance.)

Meetings have to be held for the various purposes of the corporation, and it is necessary to observe legal requisites for the validity of such meetings.

*Ibid*, p. 33.

"Notice must, therefore, in some way or other, be given to each person entitled to be present, and the omission of such notice to anyone who is of sound mind, though he may have given a general dispensation of notice, and though the omission be accidental, will invalidate the proceedings at the meeting."

*Ibid*.

Members may restrict the number having this right by constating instruments, custom or by-laws; but restrictive by-laws, which are repugnant to the constating instruments, or otherwise illegal, will be invalid.

*Ibid*.

Meetings are of two kinds—Ordinary or General, and Extraordinary or Special.

Notice of Extraordinary meetings should carefully and exactly specify objects, etc.

The majority bind the minority "unless the concurrence of all has been for special reasons rendered necessary."

The rule as substantially laid down by all approved authors is,—

That in the absence of special laws on the subject, all (each and every one) of the stockholders are entitled to notice in some one way or another.

Corporations may make and enforce by-laws for compelling, by means of pecuniary penalties, attendance of members. If all persons entitled thereto are actually present, with or without notice, and do not object, etc., want of notice is excused.

"Even persons not present, and who did not receive notice, may, by subsequent acquiescence in the resolutions passed or other business done, be bound, if *infra vires*.

Presumption, according to the maxim—*Omnia rite esse acta præsumuntur*—is that meetings are properly and lawfully called and conducted.

Ibid.

"Meetings may be adjourned, but nothing may be transacted at any adjourned meeting save the unfinished business of a former meeting."

Ibid.

## CHAPTER XIV.

Stockholders' Meetings—(*Continued*).

Will of majority controls. — Binding effect dependent upon proper notice. — Individual assent not equivalent to meeting. — Real owner, as opposed to record owner, entitled to vote. — Stock-vote as binding as sealed instrument. — Supervision by court of equity. — Illegal votes not necessarily fatal to whole meeting. — Perpetual voting trust invalid. — Inequitable or fraudulent acts restrained. — Limits of corporate power.

Will of majority controls. — Force of circumstances demands that instead of each and everyone of the stockholders managing and controlling the corporate affairs, they delegate their powers to a fewer and more wieldy number.

Ibid (Brice), sec. 3, p. 36.

These agents are of two classes:

(a) Those who may be styled the Managing or Governing body, and

(b) Ordinary or Subordinate agents.

Ibid.

Having afforded the reader a résumé of Mr. Brice's

clear and useful statement of the topic in hand, certain English and other cases will now be briefly quoted before proceeding to what other learned text-writers have said on this important subject generally.

In *Rex vs. Varlo*, Lord Mansfield said:

"It is in the nature of all corporations to do corporate acts, and where the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet upon charter day, and the majority who are present do the act."

Cowper's Reports (Cases before King's Bench), Vols. I. and II. (bound in one), pp. 248-250.

"It is a valid objection to a relator, applying for a *quo warranto* information, that he was present and concurred at the time of the objectionable election, even although he was then ignorant of the objection: for a corporator must be taken to be cognizant of the contents of his own charter and of the law arising therefrom."

*King vs. Trevenen*, 2d Bernwald and Aldersons' Reports (King's Bench), p. 339 (syllabus).

While this case affected a municipal corporation, it recognized the principle that a member of a corporation bars himself from objecting to the transactions of a meeting at which he himself was present and concurred, and that knowledge of those affairs was imputed to him.

See same subject elsewhere herein, Chap. XX., "Ratification," *post*.



"A shareholder who was present and voted at the adjourned meeting, held not entitled to take advantage of the irregularity of the notice."

Re the British Sugar Refining Co. ex parte Ferris,  
L. J., 26 Chan., 369.

The same case also held to the following effect:

"The transactions of business at the meeting, foreign to the objects specified in the notice, will not make the whole meeting irregular."

The act of a majority of the stockholders, expressed elsewhere than at a meeting of stockholders regularly convened, is not binding.

Stowe vs. Wyse, 7 Conn. Reps., 214-221.

Angel and Ames, sec. 594.

Binding effect dependent upon proper notice. — In the case of Stowe vs. Wyse, supra, Daggert, J., said:

"\* \* \* Though a meeting regularly warned would be competent to do any act within their corporate powers by a bare majority, yet if not thus warned (*i. e.*, notified), their act must be void."

If notice is not provided for by law, every member must have personal notice.

Stevens vs. Eden Meeting House Society, 12 Vermont R., 688;

opinion by Collamar, J.

The corporation and every member is bound by a majority vote of those present and properly warned (notified), and not otherwise; if no provision is made

for notification, every member is entitled to personal notice.

Steven vs. Eden Meeting House Society, 12 Vt., 688.

Where a meeting is called by personal notice on all the stockholders, their action is valid, and even if one of such stockholders was an imbecile, that objection could not avail.

“If the notice was legal then the corporation was duly summoned; the law cannot look into the capacity of the stockholders to transact business, but can only regard the capacity of the aggregate body when duly assembled. If it were otherwise, the legal capacity of a stockholder, such as coverture, infancy or insanity, would operate as an effective obstacle to a valid assembly of an aggregate corporation.”

Opinion by Bigelow, J., in Stebbins vs. Merritt, 10 Cushing (64 Mass.), 27, 32.

It is the duty of those connected with the affairs of an imbecile, infant or incompetent person to see to it that a proper person is put in charge thereof.

A party objected to meeting because notice of same was not proved—but it appeared that objector was present and voted by proxy—held, that the objection was unimportant.

Jones vs. The Milton Turnpike Co., 7 Indiana, 547.

Persons owning a majority of the stock of an incorporated company \* \* \* entered into an agreement, as between themselves, that they would elect the directors of the Company; that they would determine

among themselves as to its officers and management; and that if they could not agree they would ballot among themselves for the directors and officers and that the majority should rule, and their vote be cast as a unit, so as to control the election. Held,—

“This agreement was not against public policy; the persons owning a majority of the stock had a right to combine, and thus secure the board of directors and the management of the property.”

The above decision was based upon the assumption from facts which showed there was no hidden advantage intended—no fraud—no dishonesty.

Faulds vs. Yates, 57 Ills., 416, 422.

(Opinion of the court by Thornton, J.)

“To render the vote of an incorporated company valid as the acts of the corporation, the meeting in which it was passed must have been warned (notified) in the manner prescribed by the charter or by-laws, or in the absence of any such provision, by personal notice to the members.”

Stowe vs. Wyse, 7 Conn., 214; see also the note to the above.

Wiggin vs. Freewill Baptist Church, 8 Metc. (Mass.), 301, sanctions the doctrine that personal notice to all the members must be given, unless some other provision is made in the charter or by-laws, and that a vote passed at a meeting not so called is not binding.

“\* \* \* All the directors who were in New Haven

were notified to attend a meeting of the board for the transaction of ordinary business. This for ordinary transactions was legal notice."

Savings Bank of New Haven vs. Davis, 8 Conn. Reps., 191 (200).

To the same general effect *inter alia*, see:

Majority stockholders of a company doing unsuccessful business may sell assets. A stockholder who participates in such sale, even if it be voidable at the election of non-participating stockholders, cannot avoid it when ratified by their acquiescence.

Berry vs. Broach, 65 Miss., 450.

This also comes under the head of "The Power to Alienate," Chapter V., and "Stockholders Inter Sese," Chapter XVI., *quos vide*.

"If all the members have not received notice, a certificate by a majority is void. \* \* \* A member of a committee does not waive his right to be notified, by his absence."

Jackson vs. Inhabitants of Hampden, 20 Maine, 37.

This case is regarding a school-committee and is of questionable application to the subject of private corporations, though cited in that connection in the text-books.

The following, a leading case, touches some points other than the one under consideration.

"A majority of stockholders present at meeting reg-

ularly convened with due notice \* \* \* have the right to \* \* \* dissolve the corporation."

Hancock vs. Holbrook, 40 La. Ann., 53.

"Every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the corporation."

Dudley vs. Kentucky High School, 72 Kentucky (9 Bush), 576.

"And in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation."

Ibid,—citing Angel and Ames, sec. 393.

But note the fact that the learned judge (Lindsay) so qualifies the rule that it applies only in cases "involving no breach of trust," *i. e.*, involving only errors of judgment.

"The business affairs of a corporation are always controlled by a majority in interest, unless the charter otherwise provides."

Covington vs. Covington, etc., Bridge Co., 73 Kentucky (10 Bush), 69.

Annexed to the report of this case is a long line of cases in point; *quod vide*.

"The election of directors and other suitable officers or agents for the direction and government of the affairs of the corporation, and its conduct through



the agency of such officers, pertain to the condition and nature of corporation bodies. The creation of this corporation by the act of the legislature, which should have contained no provisions whatever for the choice of directors, or for the management of its affairs through the agency of such, would have implied all that is expressly conferred by the provisions which the act contains, except so far as those provisions relate to the time, place or other modes to be observed by the corporation in the exercise of that inherent function. \* \* \* The law is merely directory and does not in terms, or by any implication, attach such a consequence to an omission or non-observance of the prescribed mode of exercising the power to elect directors."

Hughes vs. Parker, 20 New Hampshire, 58, 71,—  
citing, Lord Hardwicke in *The King vs. Poole*,  
B. R. H., and cases *temp.*, Hardwick, 23, 2 Barnard, 95, as follows:

"\* \* \* the statute was in that case directory, only, and not restrictive, and was intended only to prevent surprise, and that where no surprise appeared to have occurred an election, begun, or continued by adjournment to any other time, is good."

See also, *People vs. Runkle*, 9 Johns, N. Y., 147.

"By usage, a tacit understanding of the members of any other way, is enough. The only effect of a stated day of meeting is to dispense with the necessity of showing a notice of meetings to absentees."

Atlantic Fire Ins. Co. vs. Sanders, 36 New Hampshire, 269; opinion by Bell, J.

Irregular elections are voidable only.

It was wholly immaterial in what way the day of the regular meetings was fixed, if it had been fixed.

Hughes vs. Parker, *supra*.

In Warner vs. Mower *et al.*, 11 Vermont, 390, Mr. Justice Redfield said,—

“\* \* \* that a manifest distinction obtains between general stated meetings of a corporation and special meetings.

“I know that stated meetings may, nevertheless, be special, *i. e.*, limited to particular business. But stated meetings of a corporation are usually general, *i. e.*, for the transaction of all business within the corporate powers.

“Unless the object of such meetings is restricted by express provision of the by-laws, it would ordinarily be understood to be general; and so every corporator would be bound to understand it. But if the object of the meeting be limited by the by-laws, it is then a special meeting, and no other business could lawfully be transacted at such meeting unless special notice was given. Where the meeting is stated and general, no notice is required either of the time or place of holding the meeting, or of the business to be transacted. Angel and Ames on Corporations, 275. Such is the general law of private corporations.”

This case also holds that all corporations are enti-

ties of the law merely, and the force and effect of every act depends upon the charter and by-laws.

Ibid.

These are denominated the constitution and laws of the corporation, and like every other constitution and all other laws, should receive such construction as to effect the probable intention of the framers.

Ibid, p. 392.

"But it is undoubtedly competent for the corporation to restrict the business to be done."

Ibid.

"If a special meeting is called for a particular purpose the corporators have a right to expect that nothing else could or would be done. But not so in regard to the annual meeting. This meeting is intended for general business. \* \* \* No doubt a corporation might provide that even stated meetings should be warned (*i. e.*, stockholders notified) in a particular way, and unless they were so warned, no business could be transacted."

This case also held in substance that meetings must be upon notice as required by by-laws or the same are wholly without authority and business done thereat is not binding; for the minority, if any, whether present or absent, could not be bound, except in obedience to the by-laws. For in that mode, and that only, have they consented to be bound. Every member is entitled to notice of special meetings unless the by-laws excuse it.

Ibid, p. 392-3,—citing *Kynaston vs. Mayor, etc.*, of Shrewsbury, 2 Strange's, R., 1051.

*King vs. Theodrick*, 8 East R., 543.

*Stowe vs. Wyse*, 7 Conn. R., 219.

*Rex vs. Mayor*, 1 Strange's Rep., 385.

*Rex vs. Mayor*, 2 Burrow's Rep., 723-728.

In regard to the question of how far unnotified members are bound, or the action of the corporation affected by failure to notify, a few words will suffice, and these are contained in the following decision:

In *Warner vs. Mower*, just above, Judge Redfield, in closing his opinion, said:

"As each corporator knew that it was competent at this meeting to transact any business pertaining to the corporate interests, the very term, annual meeting, was *ex vi termini* notice to that effect; and it would have answered no good purpose to repeat this in the notice."

Ibid.

In *Commonwealth vs. Detwiller* (Supreme Court, 1890), 131 Penn., St. Rep., 614, Mr. Justice Williams, in delivering the opinion of the court, said, *in his verbis*:

"A corporation is a voluntary association of persons engaged in a common enterprise. When the methods of voting are not fixed by general law, the corporators may make such law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the State or

of the United States. \* \* \* The same thing may be said in regard to voting by proxy."

Judge Williams further held that a regulation which was reasonable and uniform in its application, working no wrong to any shareholder and conflicting with no law of the Commonwealth, "is therefore a valid and binding law."

Ibid, p. 635.

The right to vote by proxy is "not a general right"; the party claiming that privilege must show authority. Phillips *et al* vs. Wickham, 1 Paige (N. Y.), p. 590.

In the above case the question of how far officers of a corporation have the right to hold over until their successors are elected is fully discussed by Chancellor Walworth; also, as to want of officers working a dissolution.

Provisions in statutes and by-laws requiring the election of directors of corporations to be held on a specified day are regarded as directory merely; the election, if not held on the regular day, may be held at a later day and the directors then chosen, if there be no other irregularity or infirmity in their title, will be directors *de jure*.

Opinion by Judge Earl, in Beardsley vs. Johnson, 121 N. Y., 224:

Citing, Vanderbergh vs. Broadway R. R. Co., 29 Hun., 348;

Hughes vs. Parker, 20 N. H., 58;

N. F. Ins. Co. vs. Moe, 58 Id., 48; and

Peirce on Railroads.



In regard to corporate elections, see *Argus Co., vs. Manning*, 138 N. Y., 557, wherein Chief Justice Andrews held:

Where a candidate at a corporate election receives a majority of the legal votes cast, the receipt of illegal votes in his favor does not defeat his election.

Where an agreement exists between the corporation and a stockholder that the latter shall not sell or dispose of his stock without first giving the former opportunity to buy, that mutual understanding does not disable the latter from selling, etc., even though the buyer was cognizant of the agreement. The fact that the transferee holds subject to enforcement of an equitable remedy in no way interferes with his title, nor precludes the corporation from treating him as such, and according to him all "the rights of a stockholder, including the right to vote upon the stock at a stockholders' meeting."

The enforcement of specific performance of such an agreement by a court of equity rests in the discretion of the court; it will not be enforced as a matter of right.

"It is the rule of corporate elections in stock corporations that the majority of legal votes determine the election. The owners of the majority of the shares have the right to designate the directors to whom management of the corporation shall be committed. The stockholders are the beneficial owners of the property. The majority may act unwisely, but they may change

the management for any reason, provided only that they act within the limitations of the charter."

Ibid, p. 569.

The statutes of New York, and of the other States, regulate with great care the meetings of directors and stockholders. For guidance in each particular case the laws applicable thereto should be consulted.

Brice (3d London edition), sec. 2, p. 32, says:

"A corporation is an *imperium in imperio*. Its statutes, by-laws, regulations and customs are its legal code, establish in a general manner the mode in which its affairs are to be conducted and the rights and powers of the various corporators. The members in general meeting assembled constitute a forum, supreme in all that relates to internal arrangement, provided they keep within the corporate powers and act in subordination to the immutable statutes, if any, which form its constitution. They can determine the business which shall be carried on or concurred in, in the corporate name. They can maintain or abandon the corporate rights, enforce the corporate privileges, or allow them to pass into desuetude, improve or waste the corporate property, change the nature of that property and divert it from one purpose to another,—in a word, keep the corporation alive and active, or permit it to fall into decay; but always provided that in so doing they are infringing no public rights, are within their powers and committing no breach of trust or violation of other duties

"Though a corporation is distinct from the individ-

uals composing it, yet, being intangible, it can transact its business and manifest its wishes only by and through these individuals. Consequently, meetings of the members have to be held from time to time for the various purposes connected with the corporation, and it is therefore very necessary to bear in mind and to observe the legal requisites for the validity of such meetings.

“Of those, perhaps the most important is the right which every member has, apart from provision express or implied to the contrary, to be present. Notice must therefore, in some way or other, be given to each person entitled to be present, and the omission of such notice to anyone who is of sound mind, though he may have given a general dispensation of notice, and though also the omission be accidental, will invalidate the proceedings at the meeting. Though all members have primarily a right to receive notice and attend, yet the constating instruments or custom or the by-laws of the corporation may restrict the number having this right; but restrictive by-laws which are repugnant to the constating instruments, or otherwise illegal, will be invalid.

“On the other hand, a corporation may make and enforce by-laws for compelling, by means of pecuniary penalties, the attendance of members at corporate meetings.

“But if all the persons entitled to be present at any meeting are actually present thereat, whether with or without notice, and do not object to the same on the

ground of informality, the want of notice will be excused, and they will be unable afterward to repudiate the proceedings of such meeting. Even persons not present, and who did not receive notice, may, by subsequent acquiescence in the resolution passed or other business transacted at any meeting, be bound by the same, if *ultra vires*, and be unable to object to the want of notice; so on the maxim, '*omnia esse rite acta præsumentur*,' where the corporate records are in due order and state that meetings were held, it will be presumed, in the absence of clear evidence to the contrary, that such meetings were duly summoned and properly conducted.

"The requisites of the notice so required to be given vary extremely. Generally, its essential parts will be set forth by the constating instruments. With joint stock companies this will invariably be the case; but custom, more especially with municipal and eleemosynary corporations, will sometimes determine these requisites wholly or in part.

"Special circumstances or arrangements apart, the notice should contain, *first*, the date and time, and *secondly*, the place of meeting, unless there be some standing rule or established custom, known to all the members, which fixes these, and even then it will be more advisable to issue a proper notice to remind forgetful members; and *thirdly*, the business to be considered.

"This last requisite, the business, is a highly important requisite, and a failure to specify it clearly and

accurately has invalidated many proceedings, especially in the case of joint stock companies. However, the transaction of business at a meeting foreign to the object specified in the notice will not make the whole meeting irregular; nor will a notice to transact proceedings, some of which are *ultra vires*, if the others are not so. Nor is it necessary that a notice shall call attention to matters which the law presumes that everyone is aware of.

“The length of time which notice must be issued previous to meetings is usually fixed by the constating instruments.

“In default of direct provisions it should be a reasonable time.

“How the notice is to be given will generally be stated in the constating instruments. \* \* \* In the absence of special provisions any form of notice, verbal or otherwise, will suffice.

“Meetings may be adjourned, but nothing may be transacted at any adjourned meeting save the unfinished business of the former meeting.

“Meetings are of two kinds, ordinary or general, and extraordinary or special. The former are held periodically at appointed times, and for the consideration of matters in general; the latter are called upon emergencies, and for the transaction of particular business. Extraordinary meetings being thus summoned unexpectedly, the notice relating to them ought to specify very carefully and exactly the occasion of the



summons and all the business proposed to be transacted thereat, so as to call the attention of each member in an especial manner to the circumstances. But, beyond this, and the further fact that the proceedings of an extraordinary meeting sometimes are not final, but require confirmation at some subsequent meeting, there is little difference in the requirements of both kinds of meetings, and the notice to be given previous to either, and the formalities to be observed will be very similar, if not actually identical.

“At any meeting, the majority will bind the minority, unless the concurrence of all has been for special reasons rendered necessary.”

Brice, sec. 2, p. 32, etc.

“Sometimes it is provided that not less than a definite number shall be present to render proceedings valid. As to the number which shall constitute the quorum: *First*, if the constituting instruments fix some definite number, then at least this number must be present, and in the absence of the proper number, transactions and resolutions of whatever description carried on or agreed to will simply be invalid. *Secondly*, the clause appointing the quorum may, however, be directory only, or controlled by subsequent clauses. *Thirdly*, when the constituting instruments are silent, it is the duty of the court to find out what was the usual number of directors who conducted the business of the company. But if this dictum is correct as applied to the governing body of the mercantile company, it seems that in the case of meetings of other,

if not all corporations, the quorum necessary for the transaction of special business is, in the absence of provision by statute or charter to the contrary, a majority of the members."

Ibid.

Individual assent not equivalent to meeting. — "The assent of a majority of stockholders expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times to a person who goes around to them privately, does not bind the company.

"An agency to execute a mortgage given in this manner gives no validity to the mortgage. It is not the corporation's act, which can only be authorized in the mode required by law. \* \* \*"

Duke vs. Markham, 105 N. C., 131.

Sellers vs. Greer, 172 Illinois, 549, holds that the property of a corporation is not subject to the control of its members or stockholders, unless expressed in prescribed ways, by meetings, etc.

This case sustains the principle of the legal entity of the corporation; its distinct separate existence apart from its stockholders.

"It is held that the act of a majority of the stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times, is not binding on the

corporation; the same is true for meeting of which notice is not given."

Pierce vs. New Orleans Bldg. Co., 9 La., 397.

Citing, Stowe vs. Wyse, 7 Conn. Rep., 214 (*supra*);  
and note also,

Cook on Stockholders, sec. 594; and,

Potter on Corporations, sec. 336; and note,

Gashwiter vs. Willis, 33 Cal., 11.

By way of analogy it may be said that corporate powers can be exercised by trustees only when duly assembled and acting as a board.

Gashwiter vs. Willis, 33 Cal., 11.

**Real owner, as opposed to record owner, entitled to vote.** — Real owner of stock is entitled to represent it at meeting, and the mere fact that he does not appear on the books as owner will not absolutely preclude him from the voting privilege.

People ex rel Allen vs. Hill, 16 Cal., 113.

In the opinion, by Mr. Justice Cope, it was said:

"We think no consequence is to be attached to the circumstance that a portion of the stock represented by Hill stood upon the books of the corporation in the name of Devaue alone. This was *prima facie* evidence that it belonged to the separate estate of Devaue. But it was competent for the defendant to show that it was, in fact, the property of the partnership."

"It would seem, upon principle, that the real owners of stock should be entitled to represent it at meetings

of the corporation and that the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so."

Ibid.

The pledgee of stock in a private corporate is not, for the purpose of a meeting of stockholders, to be regarded as the owner of the stock.

McDaniels vs. Flowers Brook Mfg. Co., 22 Vermont, 274.

The owner of stock, though he had pledged it, is still competent to represent it at corporation meetings, and vote as a shareholder, and his action binds the pledgee.

City of Spokane vs. Amsterdamach, 22 Wash., 172 (60 Pacific R., 141); a recent case (1900).

The opinion is by Mr. Justice Reavis; it is both clear and convincing, and enters into the subject at length.

**Stock vote as binding as sealed instrument.** — In Beach vs. Stouffer, 84 App., 395 (Missouri) it was held that the act of a corporation evidenced by a vote was as completely binding as if done under seal.

**Supervision by court of equity.** — "All the powers and jurisdiction of a court of chancery over such corporations are to be exercised in the ordinary mode in which a court of chancery acts, and this power includes that of supervising and controlling the election of directors, whenever it is made to appear that, by means of fraud, violence and other unlawful conduct

on the part of a portion of the corporation, a fair and honest election cannot be held."

Opinion of Paxton, Ch. J., in *Tunis vs. Pass.*, etc., 149 Pa. St., 70 (1892).

**Illegal votes not necessarily fatal to whole meeting.** — It is held in Pennsylvania, as elsewhere, that illegal votes cast at a meeting do not invalidate the action thereof, so long as the illegal votes do not affect the result.

*Craig vs. Church*, 6 Weekly Notes of Cases, 421 (Sup. Ct., 1879); and,

*Commonwealth vs. Morrison*, 6 Ibid, 346.

(These cases, however, were not concerning private business corporations.)

**Perpetual voting trust invalid.** — A voluntary agreement among stockholders of a corporation perpetually vesting in trustees the right to vote the stock at all meetings of the corporation is absolutely void as against public policy, and in violation of the Pennsylvania statute. \* \* \* Even if such giving of rights to vote is incident to ownership of stock, it would be no more than a proxy-right to trustees, and revocable at will.

*Vanderbilt vs. Bennett*, 6 Pa. C. C., 193; opinion by Stowe, P. J. (1887.)

This decision concerned a *quasi*-public corporation, *i. e.*, a railroad company.

In *McDaniels vs. Flower Brook Mfg. Co.*, *supra*, 22



Vermont, 274, p. 65, it was held by Mr. Justice Redfield that every reasonable presumption is to be made in favor of the proceedings of a corporation, as is done in regard to proceedings in courts of law.

The above also sustains the general rule as laid down, *supra*, viz.: That to render a meeting of stockholders forceful all the members must have notice of some description, and in the absence of prescribed rules and regulations in regard thereto, the fact must appear that each stockholder had such full and timely notification of the meeting and its objects as would lead any reasonable man to attend, if the action of such meeting might be detrimental to his interest.

An agreement, for a consideration, of a stockholder in a business corporation to vote for a particular person as manager, is void as against public policy, if not cured by the assent of all the stockholders.

Lees vs. Huttell, 2 Myl. and K., 819.

Lowther vs. Lowther, 13 Vesey, 95.

Dunne vs. English, L. R., 18 eq., 524.

Marsh vs. Whitmore, 21 Wallace (88 U. S.), 178.

Baker vs. Humpkeys, 101 U. S., 494.

Mott vs. Hamington, 12 Vermont, 199.

Smith vs. Townsend, 109 Mass., 500.

Fulton vs. Whitney, 66 N. Y., 548.

Loniland vs. Clyde, 86 N. Y., 384.

Everhart vs. Searl, 71 Pa. St., 751.

Inp.. Merc. Co. vs. Coleman, L. R., 6 H. L., 189.

Flanagan vs. R. R. etc., L. R., 7 Eq., 116.

New Simbreco P. Co. vs. Eslager, L. R., 5 C. D., 73.

**Inequitable or fraudulent acts restrained.**—The court will not permit directors or majority stockholders, notwithstanding their apparently great and extensive powers, to treat the minority stockholders inequitably, or to commit fraud upon their rights.

The reasons for vacating such contracts increase in strength when the agent, from his peculiar position, is enabled to exercise peculiar influence over the principal, as is the case when a director or an officer of a company makes a contract on behalf of the company for his own emolument, or a trustee, relied on implicitly by the *cestui que trust*, makes an unfair profit out of the latter's estate.

**Limits of corporate power.**—A leading and often cited case regarding corporate powers is *Meeker et al. vs. Winthrop I. Co.*, 17 Fed. Rep., 48 (1883).

In this case Judge Baxter laid down as among the rules which have come to be universally adopted as sound law,—that the officers of a corporation are but agents and cannot, while acting as such, deal with themselves, to the detriment of the corporation, even when authorized by a majority vote at a stockholders' meeting; and that where these facts appear, the burden of showing fairness, adequacy and good faith rests upon the parties claiming title through such corporate acts.

*Pendery vs. Carleton*, 87 Fed. Rep., 4.

For fuller treatment of this subject (fairness, etc.), see Chapters XVI., XVII., and the text generally.

Power to contract is limited to the purposes of the corporation.

Utley vs. Clark, etc., Co., 4 Cal., 369.

Where the directors are vested with corporate powers, within their proper sphere, such rights are for the time exclusive. \* \* \* The rule as to agency, as it respects the constituency, or capital and membership, is an important and fundamental point in the government of a body corporate. To change its general scope and purpose without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act, and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form.

\* \* \* \* \*

Railway Co. vs. Allerton, 83 U. S. (18 Wall), 233,  
*et seq.*

In another case in the United States Supreme Court (1873), Mr. Justice Bradley, in delivering the opinion of the court, said:

“We are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of

a stock corporation beyond the limit 'fixed' by the charter cannot be made by the directors alone unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a construction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased except in the manner expressly authorized by the charter or article of association. Authority to increase the capital stock may undoubtedly be conferred by a law passed subsequent to the charter, but such a law should regularly be accepted by the stockholder. \* \* \*

"Changes in the purpose and object of an association, or in the extent of its constituency and membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members."

Union Gold M. Co. vs. Rocky Mountain Nat. Bank, 2 Cal., 565; 3 Id., 75.

The reason for the above is obvious:

It affects the corporate purposes—the ultimate objects of the association—for the sake of which it was brought into existence. To change these without the

consent of the associates would be to commit the share-owners to an enterprise which their plans never embraced, and would be manifestly unjust. The same rule appears in *Railway vs. Allerton*, *supra*.

For certain leading authorities on the limitations of corporate action, see Chapters XIII. and XV., and the text generally, through Index.

For inherent infringement of the corporate idea, by oppressive acts of majority, through merger, etc., see Chapters XXII. and XXIII., and Index.

In concluding the consideration accorded to the important subject of stockholders' meetings in this chapter, it is necessary in fairness to reader and author alike to confess the impossibility of arranging the material in every instance in a manner at once orderly and consistent with the purpose of this work.

The particular facts and circumstances of each case locate it in connection with its central idea; but in order to avoid mutilation of the well-chosen words of the learned text-writer or judge, some ideas, more or less intimately associated with the context, have often been permitted to appear.

Careful attention to the cross-references in the Index will always be required to secure the full value of the work, including these side-lights upon the subject.

The cases immediately preceding have shown that however great may be the power of stockholders when assembled in meetings,—nevertheless that power is



subject to the fiat, "Thus far shalt thou go, and no farther."

In the next chapter it will be our duty to endeavor to briefly treat of the rights and duties of directors and other officers, reserving for the ensuing chapter a like mention of the relations of stockholders to one another.

## CHAPTER XV.

## Directors, Officers and Agents.

Importance of delegated authority. — Infrequency of litigation of subject. — Corporation has inherent right to appoint. — When appointed, are quasi-trustees. — Authority governing directors and officers. — Close resemblance of corporate to other agents. — *Ultra vires* principle applied. — Usual responsibility coupled with such agency. — Directors not insurers of fidelity of others.

Importance of delegated authority. — It has been seen (Chapter IV.) that corporations have an implied power to appoint directors.

Occupants of the office of director are called "committee-men" in the older English cases, and "syndics" in the Civil Law. This appellation, "directors," is often interchangeable with the word "trustees," just as the office itself is often merged in the broader and generic relation of trusteeship.

Whatever the word employed, the thing itself is important, since a corporation without directors, officers or agents would be helpless; that is, it would not be equipped with the necessary instruments with which to carry on its allotted work, and would remain merely a powerless identity,—impotent alike for action and

for defense. In fine, the very idea and conception of a corporation, in its practical essence and effect, denotes a combination or aggregation of individuals who place their contributions in a common fund, which, in turn, is intrusted to a chosen few selected from among their number; indeed, the very gist of the gift from the State, involved in the creation of a corporation, is the "right of many to act as one," under the guidance and direction of a properly constituted directorate. The idea and essence of a corporation implies ability to delegate such aggregated power.

Therefore, we may safely say upon the authority of the text-books and decisions, ancient as well as modern, that a corporation once given life by its creating power has the inherent right, power and authority to choose, appoint and duly empower such directors, officers and agents as may be necessary to carry out the purposes and objects for which the charter was granted and the corporation instituted.

Numerous text-writers have carefully treated of the subject of the rights, duties, powers and obligations of the directors, officers and agents of corporations.

**Infrequency of litigation of subject.**—Of these rights, etc., some have been the object of judicial investigation and interpretation; while many have been admitted *pro confesso*, and have never come before any court for deliberation.

There are certain aspects of the subject, however, which it will be found profitable to treat of in this connection.

**Corporation has inherent right to appoint.** — A corporation being an artificially created body, the power which makes and calls it into being can restrict or direct the method or manner of its selection of directors, etc., and can prescribe rules in regard thereto; but in the absence of restrictions or express delimitation, the corporate body, acting through and by its stockholders, has the inherent right and power in any reasonably proper and equitable manner to choose and appoint its directors (who stand toward it in a fiduciary capacity), as well as its officers and agents; or it may delegate the appointment of such officers and agents to a representative board consisting of its directors.

The power of the stockholders in the selection of the directors and agents, as it is applied in practice, is more fully seen in Chapters XIII. and XIV., "Meetings,"—wherein it appears that the right of the majority to rule is universally adopted and enforced.

It should, however, be here noted that all these rights must be exercised in accordance with the equitable principle of "fair play," as well as in conformity to the laws and Constitution of the creating State and of the United States.

**When appointed are quasi-trustees.** — The right of the corporation to elect its directors, and directly or indirectly to select its officers and agents, being thus shown, it is important to understand the relation which exists between such corporations and its stockholders on the one hand, and such directors,

officers and agents on the other. By referring to Chapter XVII., "The Fiduciary Relation," it will be found, as the result of centuries of litigations involving legal ability of the highest order, that it has finally been evolved and established that the relation of the director toward the stockholder is at least of a *quasi*-fiduciary nature, and that this relation is governed by the rules applicable to the trustee and the *cestui-que-trust*. A full and comprehensive knowledge and realizing sense of this fact relieves the situation of many of the difficulties and embarrassments which would otherwise surround it. This subject, *i. e.*, "The Fiduciary Relation," is quite fully treated of in Chapter XVII., to which reference has already been made.

**Authority governing directors and officers.** — Of the acts of directors and officers, it may be recapitulated that their conduct must be judged and affirmed or disavowed by reference to the provisions of the charter and by-laws viewed in connection with,—

(a) The laws and Constitution of the United States.

(b) The laws and Constitution of the parent State.

(b) The principles of equity applicable to the fiduciary relationship of the trustee and *cestui-que-trust*.

Whatever may be the object, whatever may be the surrounding circumstances of the acts of the directors or officers,—their proceedings must be approved or condemned in accordance with the standard of rela-



tionship thus established for the purpose by statutory enactment and the principles of equity.

**Close resemblance of corporate to other agents. —** Regarding the agents of the corporation, the laws and rules which apply to an agency for individuals apply in equal measure to a like relationship toward a corporation.

A railroad company may appoint agents for the accomplishments of its purposes.

Alabama and T. R. R. Co. vs. Kidd, 29 Ala., 221.

An aggregate corporation has power to appoint and employ agents to act for it.

Hayden vs. Middlesex Turnpike Corp., 10 Mass., 397 (6 Am. Dec., 143).

Judge Story, in *Bank of Columbia vs. Patterson*, 7th Cranch, 299, held that a corporation might by mere vote or other corporate act, not under corporate seal, appoint an agent whose acts and contracts, within the scope of his authority, would be binding on the corporation.

This case has never been disturbed.

See also, *Kitchen vs. Cape Girardeau and S. L. R. Co.*, 59 Mo., 514.

It is laid down in the text-books on agency that a body corporate may be a principal and appoint agents, and may also have delegated to it a power to act as agent; and such powers are either those specifically granted, or such as are incident to the objects of the relationship and conferred by implication.

**Ultra vires principle applied.** — Perhaps the case of most importance and which has been most cited and sustained, is

Jemmison, *et al.*, vs. Citizens' Bank, etc., 122 N. Y., 135.

This unanimous decision holds that contracts of corporations are *ultra vires* when they involve adventures outside of the powers given by their charter; also,—

One dealing with a corporation is chargeable with notice of its powers, and is bound to know the extent of the authority of its agents; and again,—

A corporation acting as the agent of an undisclosed principal, and so liable as principal, is entitled, when this liability is sought to be enforced, to all the rights and privileges the law would give to it if, in fact, it occupied the position of principal.

**Usual responsibility coupled with such agency.** — See another leading case to the effect that a corporation is liable for its wrongful acts and omissions and for the acts of its agents while engaged in the business of their agency to the same extent and under the same circumstances as natural persons.

Fishkill Savings Bank vs. National Bank, 80 N. Y., 162.

A corporation, like any natural person, is responsible for the acts of its agents.

Lamm vs. Port Deposit Co., 49 Md., 233.

Western Maryland R. R. Co. vs. Franklin Butt, 60 Md., 36.

A comprehensive list of authorities appears in connection with the foregoing decision (Fishkill, etc., Bank vs. National Bank).

**Directors not insurers of fidelity of others.** — Directors of a corporation are not insurers of the fidelity of the agents whom they appoint, who became by such appointment agents of the corporation; nor can they be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents unless the loss is a consequence of their own neglect of duty.

Briggs vs. Spaulding, 141 U. S., 132.

Reference to the foregoing decisions and the cases cited therein will establish the principle that corporations may be principals and authorize and duly empower agents; or may be the duly authorized and empowered agents of others, provided that the duties involved in either capacity are *infra vires*.

The intent of this chapter having been confined to a somewhat technical treatment of the powers of corporations in connection with the appointment and control of their agents, the reader is advised to consult Chapter XVII., "The Fiduciary Relation," and the text generally through the Index, for proper consideration of the important effect of those rules when applied by the courts in actions for the redress of stockholders' wrongs, and the like.

Having now briefly referred to the salient features of agency, we will next turn our attention to the in-

teresting subject of the principles and regulations which govern shareholders in their relations toward one another.

## CHAPTER XVI.

## Stockholders Inter-sese.

A semi-fiduciary relationship sometimes exists. — Courts of Equity require fair-dealing. — Discrimination is *ultra vires*. — Mutual responsibility flows from implied contract. — One cestui que trust must not injure another. — Result of distinction between disfranchisement and removal. — Equity is surest recourse. — Guilty stockholders equally liable with directors. — Difference between joint-stock companies and corporations. — Legislative intent opposed to oppression.

A semi-fiduciary relationship sometimes exists. — While it has been repeatedly held that stockholders in a corporation are not to be deemed trustees, one for the other, at the same time the courts have recognized a *quasi*-fiduciary relationship existing between them. Probably the clearest and most satisfactory thing which has been said in the text-books on the subject was by Mr. Beach in his work on Private Corporations:

“While it cannot be laid down as a general rule that the members of a corporation occupy a fiduciary relation toward one another which forbids all transactions



by which any of them may gain an advantage over the others, yet there are circumstances under which a *quasi-trust* relation has been held to exist, and where equity will interfere, on the one hand, to require an accounting from any member seeking to gain an unfair advantage over the whole body of members, and on the other, to restrain a majority from over-riding a dissenting minority."

Beach on Corporations, Chicago, 1891, sec. 70.

**Courts of equity require fair-dealing.** — An instance where the action of a majority of the stockholders will not bind the corporation is shown in *Farmers' Loan and Trust Co. vs. San Diego Street Car Co.*, 45 Fed. Rep., 518.

In this case a mortgage was set aside, although the action of the directors in making it had been ratified at a stockholders' meeting.

In the course of his opinion, Ross, J., said :

"A court of equity will not permit the directors of a corporation, who are not only trustees for the stockholders of the corporation, but for its creditors as well, to thus dispose of the corporate property to themselves, or for their individual benefit. However in fact intended, equity treats such transfers as fraudulent, because it operates as a fraud upon the *cestuis que trustent*."

The proper nature of the conduct of majority stockholders toward the others is shown in

Worth Mfg. Co. vs. Bingham, 116 Fed. Rep., 785  
(C. C. Apps., 4th Circ., 1892),

Simonton, Ch. J., Morris and Brawley, D. J. J., per  
Curiam:

"It must be kept in mind that this is a private corporation, a business enterprise that is governed by the votes of its stockholders; that they are the judges, and the best judges, as to the conduct of their own enterprise, and when the majority adopt, in good faith, a line of policy which in their opinion will best subserve the interests of the enterprise, the minority must yield."

In

Barr vs. N. Y., L. E. & W. R. R. Co., 96 N. Y., 450,  
the opinion of Miller, J., is thus stated:

"It is there laid down,

"Hawes vs. Oakland, 14 Otto (U. S.), 450,—

'Where the \* \* \* majority of the shareholders themselves are oppressively and illegally pursuing, in the name of the corporation, a course which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity, an action to obtain relief may be maintained by a stockholder.' "

This rule is similar to that which regulates the relationship of directors who occupy such positions in two or more corporations, viz., directors or trustees are not permitted to manage the corporation's interest for themselves; and though contracts between direct-

ors interested in two companies are not necessarily fraudulent *per se*, yet they are regarded with disfavor by courts of equity and will be scrutinized. See a long line of cases cited in

Hill vs. Gould, 29 Missouri, 107.

*Vide* Taylor on Private Corporations, cited therein.

The principle that the majority stockholders, while they have the legal right to manage and control the business and affairs of the corporation by and through their voting power, will be required to act fairly, properly and without oppression toward the other stockholders, is recognized in *Brewer vs. Boston Theater*, 104 Mass., 395,—

Opinion by Wells, J.:

“A majority of the corporators have no right to exercise the control over the corporate management which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. \* \* \* This proposition, if stated in reference to formal transactions, such as assessments of capital, or dividends of income, would not be questioned.

(Citing, *Preston vs. Grand D. Co.*, 11 Sim., 327.

*Hodgkinson vs. Nat. L. S. Ins. Co.*, 26 Beavan, 473.)

“But the indirect application of the common property, profits or means of profits, to their own benefit, by any portion of the corporators, in fraud of their own associates, is equally incapable of being author-

ized, or ratified, by the vote of a majority of the corporators, or by any act or omission of the corporate body.

(Citing, *Gregory vs. Patchett*, 33 Beav., 595;

*Atwood vs. Merryweather*, *supra*,

Law Rep., 5 Eq., 464, note.)

“Any advantage given to one class of stockholders over others destroys their equity and takes away a right which originally existed in it and materially varies the effect of each and every outstanding certificate of stock. Each certificate represents a right which cannot be divested or impaired without the consent of the owner, unless the power to do so is in some way reserved. Shares of stock are in the nature of choses in action, and give the holder a right in the division of the profits and earnings of the company, so long as it exists, and in its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened against the will of the owner than can any other right.”

To the above effect see—

Spelling on Private Corporations, Vol. II., sec. 598,  
p. 668 (N. Y., 1902).

**Discrimination is ultra vires.** — All manner of discrimination between stockholders is *ultra vires*.

*Ibid* (Spelling), sec. 599, *et circ*.

No right to issue preferred stock existed in the com-

mon law. It must be sought for in the charter or in the statute under which the corporation is formed.

Ibid.

"To the relations between members of an association applies with equal fitness the maxim that 'Equality is Equity.' "

Ibid, sec. 604.

Stockholders (majority) must not impair the contract. Every person who becomes a stockholder has a right to rely upon the fact that all of the other stockholders are subject to all the obligations he himself has assumed.

Ibid.

"On principles which have already been fully discussed (sec. 71, *ante, et seq.*), where the governing statute provides that when the corporation expires by limitation it shall remain a corporation simply for the purpose of having its affairs wound up \* \* \* a majority of stockholders cannot by a reorganization bind the minority so as to continue their property in the new corporate venture."

Thompson on Corporations, Vol. I., sec. 272 (San Francisco, 1895).

There is a distinction between a minority stockholder's right to have the business carried on, and his right to have some other business *not* carried on.

See Ibid, Vol. IV., sec. 4443.

In other words, a minority stockholder cannot, against the will of the majority, say that the business



of the corporation shall continue to be carried on; but he can, by application to the courts, restrain a course of *ultra vires* acts.

"Courts of equity, \* \* \* whenever necessary to the attainment of justice, will not only view the corporation as an association of persons mutually interested in a common enterprise, but will often look beyond the aggregate to determine individual rights and relations, and having done so, will furnish reparative or preventative remedies, as the case may require. Equity views the relations of the members, both to the corporation and to each other, while at law these relations are of little importance. \* \* \*

Spelling on Private Corporations, Vol. II., sec. 541.

"Individual members can only act in the transaction of corporate business at corporate meetings."

Ibid, sec. 546.

(See "Meetings," Chapters XIII. and XIV., *ante*.)

"Where wrongs by a portion of the shareholders have resulted in injury to the common corporate interest, the remedy lies through the corporation by the non-participating shareholders."

Ibid.

"The owners of a majority of the stock of a corporation, who persuade their implements and representatives on the board of directors to convey to them the property of the corporation for a grossly inadequate consideration in fraud of the minority stockholders,

must be held to have participated in the fraud of the directors."

Woodroof vs. Howes, 26 Pacific Reports, 111 (syllabus).

(Supreme Court, California, 1891.)

"The property interest of each member is entrusted to the corporate entity for express purposes and no others. These purposes are defined in the charter or articles, the terms of which become incorporated in each contract of membership at the time of signing the same. The corporation thereby assumes the relation of trustee to each and every member, and becomes *ipso facto* responsible as a trustee whose duty it is to faithfully carry out the objects and purposes enumerated in the instrument by which the duty and relation are created. The right to protection and to faithful performance to which the shareholder is entitled is co-extensive with his property interest in the subject of the trust; and the individual interest, and that of every other member combined, constitutes the entire fund entrusted to the corporate entity."

Spelling on Private Corporations, Vol. II., sec. 550, p. 622.

"True, all of the members of a corporation acting together can release one of their number from his connection with the corporation; but they must do so in the latter's name and right, just as they would convey its property."

Ibid, Vol. II., sec. 57, p. 64.

"It will be found upon examination of all the American and English authorities to be a settled general rule, with rare exceptions, that the act of a majority of the directors of a corporation, done within the limit of their powers under their constitution, and at a regularly constituted meeting of their body, is binding upon all the corporators."

Potter on Corporations, Vol. I., sec. 85, p. 129 (Banks & Bros., 1879).

"The rule that one holding a position of trust cannot use it to promote his individual interests is now rigidly administered in equity by every enlightened nation, and especially applies to the action of corporations in dealing with their corporators."

See note to *Ibid.*

The foregoing extract sets forth a principle which is familiar law, and is treated of herein in Chapter XVII., "Fiduciary Relations"; but the insertion thereof at this place will be found convenient for comparison with the less well-known rule governing the relationship of shareholders to one another.

**Mutual responsibility flows from implied contract.—**

"It is a matter of implied contract that the corporation shall administer the funds and exercise the functions according to the provisions and in accomplishment of the purposes prescribed by the charter. The stockholder has distinct individual rights as against the corporation, growing out of that relation, which he cannot be compelled to yield or forego without his

assent. In this respect he is not subject to the will or vote of the majority."

"It is only as to matters within the prescribed limits of corporate powers and capacity that he, as a stockholder, becomes, on general principles, subject to the vote of the majority. Standing upon those rights, and in the exercise thereof, he may at his pleasure, and effectually, assent to or dissent from, measures adopted by corporate vote in the usual mode."

*Ibid.*, Vol. I., sec. 88, p. 131, etc.

"\* \* \* And the rule seems to be general that beyond the limits of the act of incorporation the will of the majority cannot make an act valid; and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution."

*Ibid.*, sec. 92.

As neither the State nor the General Government can transcend the powers conferred upon them by their several Constitutions, so a corporation, acting by the grant of either, must, of course, be bound by the supreme law which limits even the power which created it a corporation.

**One cestui que trust must not injure another.** — In *Davoue vs. Fanning* (2 Johns Ch., 252), *supra*, the question of the majority and minority of cestuis-

que-trustent was considered, and Chancellor Kent said, *ibid.*, 259:

“One cestui que trust has no power to control or give away the rights of another.”

By parity of reasoning, a majority of stockholders cannot compound, ratify or legalize the fraud or wrong-doing of one or more directors (who are, as we have seen, *quasi*-trustees), where the interests of a single stockholder, however insignificant his holdings, may be damnified.

Angel and Ames on Corporations (Little, Brown & Co., Boston, 1875, 10th Edition), sec. 333, etc., and note at p. 401,—

quoted in

Land Grant Ry. Trust Co. vs. Comm'rs of Coffee Co.,  
6 Kansas, 245.

**Result of distinction between disfranchisement and removal.** — There exists a distinction between the terms “disfranchisement” and “removal,” when occurring in the decisions and authorities which treat of stockholders’ rights.

The former is applicable to a stockholder as a member of the body corporate; the latter relates to members as its officers.

The result which flows from the exercise of each species of disciplinary power points out the difference, viz.: An officer may be removed and still exercise his



rights as a member; while a member who has been dis-franchised may not exercise his former rights, etc., etc.

Angel and Ames, sec. 408, *supra*.

Where the ancient rule has been abrogated (as in New York), and a director is not of necessity a stockholder, this principle does not apply,—though we are far from advocating such excess of liberality in corporate legislation.

“Every man who becomes a member looks to the charter; and in that he puts his faith, and not in the uncertain will of a majority of the members.”

*Ibid.*, sec. 414.

The above passage is quoted from opinion of Chief Justice Tighman in

*Commonwealth vs. St. Patrick's Co.*, 2 Binn, 441 (Pennsylvania).

“Stockholders may so conduct themselves as to become responsible for corporate debts.”

Waterman on Corporations, Vol. II., sec. 275, p. 416, *et cet.*

A member of a corporation who disposes of his interest to an insolvent to escape liability will be held liable.

*Ibid.*, sec. 275.

In this regard, there seem to be two principles involved: one, that the transfer was a fraud on the creditor; the other, that it was equally a fraud upon the transferer's co-stockholders, who would, in case such transfer was successfully made, have to bear just so

much more of the burden of insolvency. Equity disapproves of acts like these.

**Equity is surest recourse.** — “The shareholders in a corporation are by the implied terms of their charter entitled to equal rights, unless the contrary be expressly provided. If the agents of the company attempt to discriminate against individual shareholders, or to deprive them of their rights of membership, the parties aggrieved may sue for relief in equity. Under these circumstances the only remedy is in equity, since the courts of law do not, as a rule, recognize the contractual relation between the members of a corporation and the individual rights resulting therefrom.”

Morawetz (2d Ed.), Vol. I., sec. 279, p. 264,

While it is not wholly parallel and relevant, it may be useful by way of comparison to revert again to the stricter rule governing the acts of directors, viz.: The directors of a corporation are its pecuniary agents and trustees; that relation requires of them “the highest and most scrupulous good faith.” They cannot acquire an interest directly or indirectly “adverse to the corporation, if they, taking advantage of their knowledge and position, make even an advantageous bargain in the purchase of claims against the corporation; the profits thus made will be treated as held in trust for the company.”

Ryder vs. L. A. & N. W. Ry., 21 Kan., 365 (a leading case).

Guilty stockholders equally liable with directors. — Referring to the duties of stockholders *inter sese*, the Court said, per Chief Justice Norton :

“In this connection we may properly remark that if persons other than directors and officers of the corporation participate with them in their fraudulent and illegal transactions, with full knowledge of all the facts as is alleged, they are equally liable with the faithless agents and officers.”

Ibid., p. 399.

The same principle controlling the fiduciary relation is again referred to in the following :

“As a general rule, a corporation is not affected by the personal rights and obligations and transactions of the shareholders who form the corporation. Yet this rule cannot be applied blindly ; a court of equity will look beyond the technical doctrine whenever this becomes necessary to do justice between the parties.”

Morawetz, sec. 229, etc.

“To justify the interference of the court with the management of a corporation on the application of a minority of the stockholders, it must be shown that the action of the governing body complained of has been so clearly against the interests of the minority of the stockholders as to amount to a wanton and fraudulent destruction of the rights of such minority, and that such action is a clear, substantial and flagrant violation of those rights.”

Hart vs. Ogdensburg and L. C. Ry. Co., 89 Hun. (N. Y.), 316,

citing, among other cases,

Gamble vs. Queens County Water Co., 123 N. Y., 92.

Twin Lick Oil Co., vs. Marbury, 78 N. Y., 159.

Kent vs. Quicksilver Mining Co., 91 W. S., 587.

The fact that a corporation has ceased doing business does not relieve directors, etc., from their duties and obligations. See,—

Matly vs. Sampson, *et al.*, 64 N. Y. App. Div., p. 1.

The relations between stockholders *inter sese*, is shown to a certain extent in

Aspinwall vs. Torrance, 1 Lansing (N. Y.), 381:

“A stockholder who has been compelled to pay the debt of his corporation may have an action of contribution against the remaining stockholders who were originally liable with him for the same.”

In regard to the rule that one stockholder is entitled to relief, the same as many, the following case might appear on a superficial reading to be opposed to the proposition; but more careful inspection will show that the learned justice sought to protect the equitable rights of majority and minority interests alike.

Drake vs. The N. Y. Suburban Water Co., 36 N. Y.

App. Div., 275; opinion by Mr. Justice Cullen.

The instances in which oppression may occur are too manifold for mention in this connection; and the subject of redress for such wrongs will not be referred to here.

For treatment of these vital phases of the general theme, see Chapter XIX., “Stockholders’ Rights and

Wrongs," and Chapter XXI., "The Remedies," together with matter in text generally, per Index.

**Difference between joint-stock companies and corporations.** — Regarding the difference between joint stock companies and corporations see—

" \* \* \* an original and inherent difference (exists) between the corporate and joint-stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body and draws in the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in

*Supervisors of Niagara vs. People*, 7 Hill (N. Y.),

312,

and in

*Gifford vs. Livingston*, 2 Denio (N. Y.), 380. \* \* \*

"the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of all individual liabilities, which otherwise would flow from the inherent effect of the



porate creation. \* \* \* the legislative intent is still to preserve and not to destroy the original difference between the two classes of organizations."

People *et al.* Winchester vs. Coleman, 133 N. Y., 279. Opinion by Finch, J.

Joint-stock companies, as a means of combination, have become antiquated and fallen into deserved disuse. They no longer can be said to exist outside of the statute.

While the distinction referred to in the preceding cases has an historical interest, it does not concern us especially at this time, and will not be given further consideration.

**Legislative intent opposed to oppression.** — Reverting to the subject generally, it may be assumed that the legislature, *i. e.*, the people acting in their sovereign capacity, will never advertently clothe the majority of an aggregation with the right to oppress the minority; hence the exercise of such a power implies a misconstruction or a perversion of the chartered rights.

This is the rule and principle we have sought to illuminate by the authorities contained in the foregoing chapter. It may and should be invoked whenever and wherever majorities in corporations seek to benefit themselves at the expense of the minority, and to misuse the power conferred by the State at their creation.

## CHAPTER XVII.

### The Fiduciary Relations.

A much-debated question. — The principle at last established. — Director occupies a fiduciary position. — Elements of doctrine stated. — Lord Hardwicke quoted. — A leading modern case to same effect. — Rule in Federal Courts. — Other leading cases. — Courts protect weaker from stronger. — Canadian authority. — Recent English case. — Rule as modified in application.

A much debated question. — For many years there has been, both in this country and in Great Britain, a constant discussion of the question whether the directors of corporations are trustees.

It has been treated of by the ablest jurists in various phraseology and from various standpoints.

While the consensus of opinion is in favor of the general proposition, there are many by-paths of this subject which remain untrodden; and in this connection the insurance litigation now pending in the courts of New York will tend greatly to the delimitation of the degree of responsibility which the director assumes when he undertakes to represent a corporation in that capacity.

From what has been said and recorded in the reports and in the works of numerous text-writers, we are justified in asserting that by the rule as now established the directors of a corporation, while not technically trustees, yet occupy such a fiduciary relation as to entitle them to be styled *quasi-trustees*; so that the principles, rules and doctrines which govern the acts of trustees in their dealings with or concerning their trust estates apply within certain limitations to the dealings of directors with their corporation, its property and stockholders. The foregoing is a proximate definition of the situation as it exists to-day.

**The principle at last established.** — It may well be noted here that this crude delimitation of the province of the director has become firmly established only after almost interminable litigation. The history of corporate litigation shows that time and again after the apparent establishment of a recognized standard, the question has become *redivivus*, and positions founded on what seemed unimpeachable authority have been the object of renewed assaults. In some instances opinions were recorded which temporarily disturbed the principle above enunciated; but by the grand consensus of opinion of those of best authority, as has been said and as it would now seem,—this rule, principle and doctrine is at length settled and established.

**Director occupies a fiduciary position.** — “A director of a corporation is the agent or trustee of the stock-

holders, and as such has duties to discharge of a fiduciary nature toward his principal and is subject to the obligations and disabilities incidental to that relation."

Cumberland Coal Co. vs. Sharman, etc., 30 Barb. (N. Y.), 553 (a leading case).

Whether in a strict sense a director of a corporation is to be called a trustee or not, there can be no doubt that his character is fiduciary.

Hoyle vs. Plattsburg R. R. Co., 54 N. Y., 314.

A trust by implication is created in favor of the stockholders.

See opinion of Lord Justice Blackburn in Taylor vs. Chichester, etc., Ry. Co., L. R. 2, Exc., 356, 378.

Russel vs. Wakefield, etc., Ry. Co., L. R. 20 Eqr., 474, 479.

Directors are trustees.

Robe vs. Dunlap, 6 Dick (50 N. J. Eq.), 40,  
Rural Homestead Co. vs. Wilds, 9 Dick (54 N. J. Eq.), 668.

Guild vs. Parker, Receiver, etc., 14 Vroom (N. J.), 430,

and various New Jersey cases therein cited.

The directors of a corporation, while not technically trustees thereof—as the title of the corporate property is vested in the corporation itself—are charged with the duties of trustees, and are bound to care for the

property and manage its assets in good faith, and for a violation of the duty resulting in waste of assets, injury to its property, or unlawful gain to themselves, they are liable to account to the corporation or to its representatives, the same as ordinary trustees.

Bosworth vs. Allen, 168 N. Y., 157.

Directors of a public company (corporation) are trustees for the stockholders, and their private interests must yield to their public duty whenever conflicting.

In re Cameron's vs. Coalbrook, etc., Ry. Co., *ex parte* Bennett, 18 Beavan, 339; affirmed 24 L. J. Ch., 130.

In the foregoing noted English case the Master of the Rolls said:

"I look upon the directors of a company as trustees for the shareholders, and it is in that character and quality that they accept their office, with all its corresponding duties and liabilities. It sometimes happens, and it does so peculiarly in this case, that directors have individual interests conflicting with their duties as trustees of a company. In such cases they are bound to consider, before they accept the office of directors, whether they are prepared to make their duties, as directors, predominate over their personal interests as creditors or otherwise, and to make them subordinate to their duties and liabilities as trustees."

The directors of a company are trustees and have attached to them, for the benefit of the shareholders,



the liability and duties which attach to trustees and agents.

The Great Luxembourg Ry. vs. Maguay, 25 Beavan, 586.

A director for a company is also a trustee for it.

Ex parte Larking, *re* Imp. Land Co. of Marseilles, 46 L. T., 235; S. C., L. R. 4 Ch. Div., 566.

Directors are regarded as trustees.

Mutual Building Fund, etc., vs. Bosseinx, 3 Federal Rep., 817.

The officers and directors of corporations are trustees of the stockholders, and must not secure to themselves advantages not common to all the stockholders. Corbett vs. Woodward, 5 Sawyer (U. S.), 403 (9th Circuit, Oregon, 1879).

**Elements of doctrine stated.** — A leading and often cited case is

Meeker vs. Winthrop Iron Co., 17 Fed. Rep., 48.

This was in the United States Circuit Court, Mich. (1883), opinion by Judge Baxter; and in it were laid down the rules which have been universally adopted, namely:

*First.*—That the officers of a corporation are but agents and cannot, while acting as such, deal with themselves to the detriment of the corporation for which they act.

*Second.*—That even a majority vote at a stockholders' meeting cannot lawfully authorize its officers to lease its property to themselves or to another corpo-

ration formed for the purpose and owned exclusively by them, unless such lease is made in good faith and is supported by an adequate consideration.

*Third.*—That the burden of showing fairness, adequacy and good faith is upon the parties claiming under such lease, etc.

To the same effect see

Potter on Corporations, secs. 85-88.

A director in a corporation is in a fiduciary position toward the company.

Imperial Credit Co. vs. Coleman, L. R. 6, K. L., 189 (1891).

Directors occupy fiduciary relation to stockholders. Koehler vs. Black Falls Iron Co., R. F. 2, Black (U. S.), 715.

Thomas vs. Brownville, T. K. Ry. Co., 109 U. S., 522.

“I look upon it as clear that all corporations are trustees for the individuals of which they are composed, and that those who act for the corporation and conduct its affairs are trustees for the corporation and cannot appropriate the corporation funds to their individual advantage to gratify their passions, or to serve any other purposes than those for the general interest of the corporations and its creditors.”

The foregoing statement of the proposition is by Sir William Blackstone:

1 Blackstone's Commentaries, 477.

Persons who from time to time exercise the corporate powers may, in their character of trustees, be

accountable to a court of chancery for a fraudulent breach of trust, etc., etc.:

Opinion of Chancellor Kent in  
Attorney General vs. Utica Insurance Co., 2 Johnson's  
(N. Y.), Chancery R., 371.

Lord Hardwicke quoted. — The Father of Equity,  
Lord Hardwicke, said:

"I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the Crown.  
\* \* \* Therefore committeemen (directors) are most properly agents to those who employ them in trust and who empower them to direct and superintend the affairs of the corporation."

The Charitable Corp. vs. Sir Robert Sutton and others  
(Case 269, August 13, 1742); 2d Atkyns, p. 400.

This interesting early case deserves, and will repay, careful attention.

See:

Domat's Civil Law, 2 B. T. 3, sec. 1 and 2.

Directors are trustees in their relation to the corporate body.

See

Cumberland Coal and Iron Co. vs. Parish, 42 Md.,  
598, 605.

wherein Alvey, J., says:

"The affairs of corporations are generally entrusted to the exclusive management and control of the board

of directors, and there is an inherent obligation implied in the acceptance of such trust, not only that they will use their best efforts to promote the interests of their shareholders, but that they will in no manner use their positions to advance their own individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty."

**A leading modern case to same effect.** — The well-known case of

The Farmers' Loan and Trust Co. vs. Trustees of the  
N. Y. and N. R. Ry. Co., 150 N. Y., 410,

holds that when the majority of the stock of a corporation is owned by another corporation and the latter assumes the control of the business and affairs of the first corporation, through its officers and directors, it assumes the same trust relation to the minority-stockholders of the controlled corporation that a corporation usually bears to its stockholders; and when it appears that it has made use of such trust relation to secure or promote some selfish intent, "it is enough to set a court of equity in motion and to require the majority-stockholding corporation to explain such a transaction."

**Rule in Federal Courts stated.** — Contracts made by directors with themselves or those with whom they stand in confidential relations, which appear directly or indirectly to inure for their own benefit, will not be enforced.

McGourkey vs. Toledo and O. C. R. Co., 146 U. S., 536 (1893).

“\* \* \* and any management by which directors of a corporation become interested adversely to such corporation in contracts with it \* \* \* or become parties to any understanding to secure to themselves a share in any transactions to which the corporation is also a party, is voidable at the election of the corporation or by the party whose rights are sacrificed.”

Ibid.

The case of McGourkey vs. Toledo, etc., above cited, is one of the greatest importance and merits a careful examination in connection with the subject. It is reported in 36 Lawyers' Annotated Rep., 80 (Rochester, N. Y.), with copious notes.

**Other leading cases.** — The fiduciary relation existing between directors and stockholders is recognized in

McIntyre vs. Ajax Mining Co., 17 Utah, 213; where it is held that this rule does not affect the right of directors to purchase stock from the shareholders so long as there is no active misleading on the part of the directors.

Haarstick vs. Fox, 9 Utah, 110; affirmed 156 U. S., 674.

In this case (Haarstick vs. Fox), Miner, J., says:

“He (the director) is entitled to the benefit of his facilities for information. There is no confidential relation between him (the director) and the stockholder, so far as a sale of stock between them is con-



cerned; and as long as he remains silent, and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud."

(Citing, *Gillett vs. Bower*, 23 Fed. Rep., 625;

*Morawetz on Corporations*, sec. 565;

*Deaderick vs. Wilson*, 8 Baxter [Tenn.], 108;

*Comm'rs of Tippecanoe County vs. Reynolds*, 44 Indiana, 509;

*Carpenter vs. Danforth*, 52 Barb. [N. Y.], 581; 2 Pom. Eq. Jur. Prud., 902-4;

*Allen vs. Gillett*, 127 U. S. Sup. Ct., 589).

Referring again to the case of

*McIntyre vs. Ajax Mining Co.*,—

Mr. Justice Bartch said therein, with the concurrence of the full bench:

"In such case the acts of directors, because of the fiduciary relation existing between the officers and stockholders, will be closely scrutinized in equity and the directors held to a strict measure of care, duty, fidelity and disability.

"Honest and faithful administration of corporate affairs, and the fidelity of the trustee to the *cestuis que trustent*, are what the laws aim at; and directors of a corporation will not be permitted to gain a pecuniary advantage over the stockholders because of their official position and consequent superior knowledge of the affairs of the company."

(Citing, *Twin Lick Oil Co. vs. Marbury*, 91 U. S., 587.

*Peabody vs. Flint*, 6 Allen [Mass.], 52.

*People ex rel Plugger vs. Township B'd of Overysell*, 11 Mich., 222).

**Courts protect weaker from stronger. — In**

*Fisher vs. Bishop*, 108 N. Y., 250,

it is said there is—

“No branch of equity jurisprudence where the court is more ready to exercise its powers, than in protecting the ‘weaker’ from the ‘stronger.’”

Lord Eldon, in

*Gibson vs. Jeyes*, 6 Vesey, 266,

said it is the great rule, wherever fiduciary relations exist, that the trustee is invariably the stronger and the *cestui que trust* the weaker; for the strength is largely in the knowledge which the trustee has of all his own doings; the *cestui que trust* is weak, because ignorant.

The same principle and rule of law which obtains in this country generally is also well sustained in our Territory in the Pacific:

In the case of

*Bolte vs. Bellins*, 15 Hawaiian Reports, p. 151 (1903),

the court, Chief Justice Frear, with Galbraith and Perry, J. J., sitting, held that

“Directors stand toward the corporation in the relation of trustees to a *cestui que trust*, and when they

vote to themselves salaries or other compensation it cannot be allowed to stand unless shown to be fair and reasonable. \* \* \*

“Directors can no more use the property of their principal for their own private gain than any other agent or trustee; they must act in good faith and for the interests of the stockholders they represent.”

\* \* \* The burden of proving bona fides in such transaction is with the directors.

Ibid.

It has been abundantly shown that dealings of directors of joint stock corporation with the subject-matter of their trust is viewed with jealousy by the courts.

The general doctrine is that such contracts are voidable. There are cases where such contracts are void *ab initio*, as when an agent-to-sell buys for himself.

Twin Lick Oil Co. vs. Marbury, 91 U. S., 587, 589.

**Canadian authority.** — The fiduciary relationship existing in corporation matters is supported by the opinion of Sir Henry Strong, Ch. J., in Edgar vs. Sloan, XXIII, Canada Sup. Court Reps., p. 644.

**Recent English case.** — This fiduciary relation has, at a comparatively recent date, been strongly supported in England.

See Alexander vs. The Automatic Tel. Co., Ltd., Vol. XVI., The Times Law Rep., p. 339.

This case was an appeal, and was before Lindley, Master of the Rolls, and Rigby and Vaughan Williams, Lords Justices.

The court said :

“The Court of Chancery has always exacted from directors the observance of good faith toward their shareholders and toward those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim, *caveat emptor*, has no application to such cases, and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits, and must account for them to the company, so that all the shareholders may share alike. Gilbert’s case (L. R. 5, Ch. 559), is only one of many instances illustrating this principle.”

It is submitted that the foregoing is a clear and concise statement of the equitable rules obtaining in such cases. And it may be permitted to observe here, with feelings of wonder mingled with regret, that colossal fortunes have been carved out and built up by manipulation of corporate interests, properties and funds in the very face of such existing rules, principles and doctrines. That such things have been frequent in the past must have arisen from one of two facts,—either an ignorance of the law, or an indisposition to ask for its application.

**Rule as modified in application.** — Directors of a

corporation are required only to exercise ordinary diligence in the management of the affairs of the corporation, and are not liable for losses sustained on account of their honest mistakes of judgment.

Spering's Appeal, 71 Pa. St., 11 (1872), Sharswood, J.

Watt's Appeal, 78 Pa. St., 370 (1874), Gordon, J.

Thomson's Appeal, 11 W. N. C. (Pa.), 414 (1879), Paxon, J.

In Spering's Appeal the syllabus is—

1. Directors in a stock corporation are not technical trustees, but are as mandatories, and are bound to apply no more than ordinary diligence and skill.

2. Directors are not liable for mistakes of judgment although so gross as to appear absurd, if honest and within the scope of their powers; especially where acting under direction of legal counsel.

3. Directors are responsible to the stockholders for losses from fraud, embezzlement, wilful misconduct, breach of trust, gross inattention or negligence by which fraud has been perpetrated by agents, officers or company directors.

The opinion of Mr. Justice Sharswood is, in part, as follows:

"It seems unnecessary to pursue this investigation any further. These citations, which might be multiplied, establish, as it seems to me, that while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or wilful misconduct or breach of trust for their own benefit



and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body." (Citing, *The Charitable Corporation vs. Sutton*, supra

p.

*The Great Luxembourg Ry. Co. vs. Magna*, supra p. Ex parte Bennett, 18 Beavan, 339).

The case also cites

Lewin on Trusts, sec. 595.

Notwithstanding this modification of the rule, which otherwise would be too rigid for practical application, the later decisions, as we have seen, confirm the position so resolutely assumed in those early cases; and this union of correct reasoning with the loftiest equitable principles has produced its offspring, as it were, in the "Rights" which will be considered in a later place (Chapter XIX.), and, indeed, will enter largely into the remainder of this work.

## CHAPTER XVIII.

### Inspection of Books and Papers.

Discussion of principles on which right is based. — Inspection an incidental and common-law right. — Includes right to make copies. — Receivership not ground for refusal. — Promotion of ulterior purpose through inspection not favored. — Mandamus proper remedy for refusal of right. — Recent decisions confirmatory of the text.

Discussion of principles on which right is based. — Among the various rights pertaining to stockholders as such, nothing, perhaps, is of more moment than their right to inspect the books and papers of their corporation, and thus to inform themselves of what the officers and agents of the company are doing with the property.

Secret business methods, like secret tribunals, have always been distasteful to the Anglo-Saxon race.

Both the common law and the universal trend of opinion incline to permit men to know what is transpiring with their interests, even where their ownership is only in part.

See the very recent decision of the U. S. Supreme Court, of which mention is made at close of this

chapter; also, like reference to similar decision in Federal Court in Missouri.

As will be seen, the common law favors the right of a stockholder to examine the books and papers of the corporation of which he is a component part; and to keep himself informed as to all its transactions, because they and each of them affect his interests. Yet it must be remembered that while he (the individual stockholder) is thus entitled to investigate in his own right, the maxim *sic utere tuo ut alienum non lædas* nowhere more fittingly applies. To afford to the stockholder the unlimited right at all times to inspect and examine the books and papers of his corporation, and to know all of its business, in most instances would so cripple and impair the business-workings of the corporation as to entail serious if not fatal damage to its affairs.

Again, it is to be noted that the right to inspect books and papers may, to a certain extent, be waived by the stockholder; that privilege being one which may be restricted by rules and by-laws assented to or acquiesced in by the stockholder, at the inception of the relation.

From the general trend of opinion, however, it is to be plainly seen what the general rule governing the situation is, viz.: That having due regard for corporate rules and regulations on the one hand, and the common-law rights on the other, the courts will sustain the right of the stockholder to inspect the books and papers of the corporation within reasonable restrictions as to

time, etc., when such stockholder shows to the court a just and sufficient reason why such inspection should be had. And it will be found generally that in the Federal and various State Courts (excepting one State [New Jersey], where minority rights of recent years are largely ignored) the practice and rule is as above set forth. It should be mentioned in that connection, however, that this right and privilege is not to be exercised or enjoyed by the stockholder for the benefit of third parties, or from caprice, or for mere idle curiosity; but only for the personal benefit of such enquiring stockholder. This rule has been repeatedly laid down in nowise uncertain language, and is settled law.

The right and privilege of inspection of books and papers and documents, as an absolute common-law right,—which it primarily is,—includes the right to copy or take memoranda of the same, either personally or by a duly authorized attorney or agent.

The rule is substantially the same in the text-books and the decisions.

See

Clark and Marshall, Vol. II., sec. 530-1, p. 1646; also Cook on Corporations, Vol. II., sec. 511, etc.

**Inspection an incidental and common-law right.** — In Thompson's Commentaries, sec. 447, the pervading principle is thus stated:

"One of the privileges incident to ownership of stock in a corporation is that of an inspection of the books and condition of the company, and this privilege in

general becomes a right when the inspection is sought at proper times and for proper purposes. In England and in many of the United States this right has been guaranteed by statute, and these statutes are generally regarded as merely an affirmance of the common law."

Also see Angel and Ames on Corporations, sec. 681 :

"A stockholder in any joint stock corporation is entitled during the usual hours of business not only to inspect the books in which transfers of stock are registered, and the books containing the names of stockholders, but also to take a copy or memorandum of the names of the stockholders.

"A stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose. \* \* \* \*

\* \* \* \* \*

"The common-law right of the stockholder, with reference to the inspection of the books of his corporation, still exists in the State (New York), unimpaired by legislation; and the Supreme Court has power, as part of its general jurisdiction, to enforce the rights in its sound discretion, upon good cause shown."

Matter of Steinway, 159 N. Y., 250; affirming 31 App. Div., 70.

The books and papers of a corporation are not the property of the directors or officers of the company, but are the common property of the stockholders, in



which each individual stockholder has a distinct and inviolable interest.

See

Huyler vs. Cragin Cattle Co., 40 N. J. Eq., 392;  
Commonwealth ex rel Seller vs. Phoenix Iron Co., 105  
Penn. State Reps., 111;  
Cockburn vs. Union Bank of Louisiana, 13 La. Ann.  
Rep., 289-290.

The foregoing cases are approvingly referred to by Mr. Judge Vann in his opinion in *Matter of Steinway*, *supra*.

That case in turn was cited by Chief Judge Parker, in *Matter of Fitch*, 160 N. Y., 87:

"Again, a situation might have been presented during the period of administration, where the executor would have deemed it his duty to apply to the Supreme Court to exercise its general jurisdiction in behalf of the stockholders' common-law right of inspection of the books of the corporation, as was done in the *Matter of Steinway*, 159 N. Y., 250."

For further approval of the rule laid down in *Matter of Steinway*, see—

In re Pierson, 44 App. Div. (N. Y.), 215;  
opinion by O'Brien, J., all concurring.

Spelling on Private Corporations, sec. 655, etc. (Ed. 1892); and cases cited.

See in this connection,—

*Chable vs. Nicaragua Canal Construction Co.*, 59 Fed. Rep., 846 (Southern District of New York, 1893).

In this leading case, La Combe, J., said:

"The right of an individual stockholder to obtain from the court an inspection of the books in the court's custody, in order to inform himself as to past transactions and present conditions, or to enable him to determine what may be most conducive to the protection of his own interests as a stockholder in the future, is one entitled to the favorable consideration of a Court of Equity."

In the United States a shareholder in a corporation has the right, under proper safeguards, to inspect the books of the concern, unless the charter and by-laws otherwise provide.

*Ranger vs. Champion Cotton Press Co.*, 51 U. S., Fed. Reps., 61, etc.

A case which has been much quoted in reference to the above subject is,

*Legendre vs. The New Orleans Brewing Association*, 45 La. Ann. R., 669,—

holding substantially that the constitutional right of stockholders of a corporation to examine its books cannot be denied; that there can be no question that the ownership of stock confers the authority to see that the property is well managed; and that the exercise of that right primarily involves the right to examine the books. The case further holds that the

refusal of the corporation, in a proper case, exposes the corporation to prosecution, either by way of mandamus, or an action for damages against the corporate officers who prevented the examination.

The statutory provisions conferring the right of stockholders to inspect books, etc., at proper times and places, and for proper purposes, etc., is only a confirmation of the common-law right in the premises.

Statutes conferring a like privilege do not deprive the stockholder of the common-law right to examine the transfer books—

See, *Matter of Sage*, 70 N. Y., 220.

The following by the same court is concise and convincing:

“The principle upon which a stockholder is allowed access to the books of a corporation is as applicable to the case of a banking corporation as it is to any other kind of corporation. It is his common-law right, and unless restricted by law or by the charter, the exercise of that right will not be denied him at a proper time and place, when the circumstances are such as seem to the court to make that right available.”

*In re Tuttle vs. The Iron National Bank of Plattsburgh*, 170 N. Y., 9.

The books and papers of a trading corporation, though of necessity left in some one hand, are the common property of the stockholders; and unless the charter provides otherwise, a stockholder has the right, at proper times, to inspect them personally, and,

with the aid of a disinterested expert, to make extracts from them for a definite and proper purpose.

Phoenix Iron Co. vs. Commonwealth, ex rel Seller, 113 Penn. State Reps., 563.

The above is a leading case in that State.

The case of Lewis vs. Brainard, 53 Vermont, 510, has been cited in support of the principle that the stockholder has a right to examine the books of the corporation. That case, however, was brought under certain delimiting statutes, and is local in its application.

"The act of incorporation gives the directors power to make such by-laws as shall be needful, touching the government of the corporation, the management of its business and property." \* \* \*

"Whether by-laws are reasonable and consistent with law is a question solely for the court."

Commonwealth vs. Worcester, 3 Pick., Mass., 462; Angel and Ames on Corporations, Ch. 9, 177 to 200; Village of Buffalo vs. Webster, 10 Wend., N. Y., 100; Dunham vs. The Trustees, etc., of Rochester, 5 Cow., N. Y., 465. \* \* \*

"What would be said of a legislative body who would refuse to a member the knowledge of its proceedings while he was absent, or perusal of its journals?"

The foregoing authoritative statement is from the opinion of Chief Justice Savage, in

The People ex rel Muir vs. Throop, 12 Wendell (N. Y.), 183.

In New Jersey—the parent State of numerous corporations and of statutes favorable to controlling interests—the earlier law concerning the right of inspection and examination of books is clearly laid down in *Huyler vs. The Cragin Cattle Co.*, 40 N. J., Equity, 392, wherein the chancellor ordered that the books of the company, which were kept out of the State, should be brought into the State, and that the petitioners should be allowed, at reasonable specified times, to examine them after they should have been so brought in.

This decision, however, was based upon a local statute. The learned chancellor, in his opinion, p. 392, goes on to cite approvingly,

*Cockburn vs. Union Bank of La.*, 13 La., Ann., 289.

*People ex rel Muir vs. Throop*, 12 Wend. N. Y., 183.

*State ex rel Rosenfeld vs. Einstein*, 17 Vr. (N. J.),

479 (46 N. J. L.) ; as well as,

*Field on Corporations*, sec. 118; and,

*Angel and Ames*, *supra*.

As has been abundantly stated herein, the right of inspection of the books and papers of a corporation by a stockholder is a common-law right. That right is sometimes conferred by statutory enactment; but under the principles above enunciated such statutory permission does not deprive the Supreme Court, or other tribunal having original equitable jurisdiction, of its inherent power to compel the enforcement of such right whenever it is clearly shown that the exercise of such right will result in the furtherance of justice.



**Includes right to make copies.** — Stockholders may, at all reasonable and proper times, inspect and copy the books and papers of the corporation of which he is a member, providing he is “interested in some special object,” or has “in view some proper purpose in respect to which the inspection is requisite.”

See Am. and Eng. Enc. Law, Vol. XIX., p. 231, *et seq.* (1st Ed.), and cases cited.

The right of a creditor of a member of a company to inspect the register of mortgages under sec. 43 of the Act of 1862, includes a right to take copies of the register.

Nelson vs. Anglo-American Land Mortgage Agency Co., L. R., 1 Chanc. R., 1897, 130.

In the above case Justice Sterling said:

“The general effect of the judgment of the Court of Appeals is that a right to inspect carries with it a right to take copies, unless it can clearly be seen that the latter right was not meant to be given.”

*Ibid.*

A corporator of a municipal corporation has a right to have a general inspection, and to take copies of the public documents and records of the corporation under such rules and restrictions as will preserve them from loss or mutilation and prevent any serious interruption of the duties of the custodians.

This right is not to be restricted to cases where the corporators have some private interest for the enforcement and protection of which an inspection of certain documents is necessary.

People ex rel Henry vs. Cornell, 47 Barb.(N. Y.), 329.

In the above case Barnard, J., said :

"It cannot be seriously questioned that the corporation, notwithstanding the appointment of officers to conduct the business of the corporation, retain a very great interest in the mode and manner in which it may be conducted, and consequently upon the above reasoning have a right to full knowledge of all the official acts of their officers, and, of course, right to all the means of knowledge which their officers possess in their official capacity."

But see same entitled case, 35 How. Pr. Rep. (N. Y.), 31, in which the rule seems to be modified.

**Receivership not ground for refusal.** — In the following decision, Mr. Justice Dixon said :

"Undoubtedly, at proper times and for proper purposes, shareholders are entitled to inspect corporate books."

Rosenfeld vs. Einstein, 46 N. J. L., 479.

Where a stockholder of a corporation which is in the hands of a receiver seeks leave to inspect its books, it is no ground for denying him the right that his object is to obtain material to convince other stockholders that a plan of reorganization, which has not met the approval of a majority of them, should not be carried out.

"The fact that corporation is in receiver's hands does not affect the right."

People vs. Cataract Bank, 5 Misc. Rep. (N. Y.), 14;  
see also,

Chable vs. Nicaragua Canal Construction Co., 59 Fed.  
Rep., 846.

The right of inspection is not extinguished by the  
dissolution of the corporation.

Hall vs. Connell, 3 Youngs and Collyers Reps., 707-  
713.

**Promotion of ulterior purpose through inspection not favored.** — The authorities hold that upon his application to the court, the stockholder is bound to show that the information sought is for a necessary and proper purpose, and for the applying-stockholder's own use, and is not intended to benefit "ulterior objects or other persons." The propriety and necessity of such a rule is obvious.

Clark and Marshall, sec. 530.

Cook on Corporations, sec. 511.

In England the application is denied unless the stockholder shows to the court the purpose of the inspection, and the court deems such purpose reasonable and proper.

Morawetz, sec. 473.

This idea of the proper purpose of the inspection appears very distinctly and runs through all of the discussions upon the subject. As already suggested herein, this common-law right, if too freely exercised, would seriously hinder the corporate business and might even paralyze the corporation's life.

Accordingly, the principle of "business exigency" here asserts itself, and abrogates the common-law rule as soon as such inspection ceases to be an imperative necessity. And the question as to which of these opposing principles shall prevail is for the conscience of the court, in the exercise of a sound discretion.

In *Walsh vs. The Press Co.*, 48 App. Div., 333 (1900), it was held that a discovery of the books and papers of a corporation would not be ordered by the court unless facts and circumstances were stated to the court sufficient to show that the books and papers sought to be examined contained material evidence for the party moving. This unanimous opinion explains quite fully the rules and practice in this connection.

The court will not grant an application by members of a corporate body for a mandamus to inspect the documents of the corporation unless it be shown that such inspection is necessary with reference to some specific dispute or question pending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion.

Where members of a corporation, merely alleging grounds on which they believed that its affairs were improperly conducted and the officers unduly chosen, and complaining of misgovernment in some particular instance not affecting the parties themselves, or any matter then in dispute, applied to the master and ward-

ers to allow them to inspect and take copies of all records, books and muniments in the possession of the master and warders belonging to the company, or relating to its affairs, the court discharged the rule with costs.

See,

The King vs. The Master and Warders of the Merchant Tailors Co., 2d Bannewell and Adolphus Reps., 115. (King's Bench, Easter Term, 1831.)

In England the courts compelled the shareholder asking leave to inspect books, etc., of the corporation to give an undertaking that plaintiff, his solicitor and agents would not make known the information derived from the inspection; holding in effect that the shareholder, though he himself had the right to inspect, etc., had no right to divulge the resulting information to others, and that an injunction would issue to prevent the same.

Williams vs. The Prince of Wales Life, etc., Co., 23 Beaven, 338. (Eng. Chancery, 1857.)

In a recent case in the Appellate Division, First Dept. (N. Y.), May Term, 1903, the rule was applied by Mr. Justice Ingraham, in an unanimous decision, holding that in the particular case there under consideration the order for examination of books, appealed from, was too broad and should have been restricted "\* \* \*" to the corporate minute books and by-laws of the defendant, the S. S. McClure Co., relating to the contracts which are annexed to and made a part of the complaint."



De Brunoff vs. McClure Tissot Co., 82 N. Y. Sup.,  
38-39.

The right of inspection of books and papers exists for the purpose of disclosing something which "it is the right of the stockholder to know; and not merely to annoy the corporation, or for some purpose other than the stockholders' interest."

The People ex rel McElwee vs. Produce Exchange Trust Co., 53 App. Div., 93.

In the above case the object of the writ was to obtain information for the State, in furtherance of an effort to cause the parties defendant to make good any deficit occasioned by their misconduct.

Opinion by Rumsey, J., Patterson, O'Brien and Hatch, J. J., concurring.

Van Brunt, P. J., in a minority opinion, said:

"I think that by the rule established in the Steiny case, 159 N. Y., 250, the motion should have been granted."

In this case, however, the mandamus was refused upon the ground that the respondent had denied nearly all of the material facts set up in the moving papers upon which the court was asked to exercise its jurisdiction. In effect, the court found there was a failure of proof, and denied the application in its sound discretion.

The decision cannot be said to disturb the principles above laid down.

Mandamus proper remedy for refusal of right.—

A stockholder has the right to the inspection of the books of the corporation of which he is a member, and mandamus is the proper method of enforcing the same.

See opinion of Chief Justice Savage, in *The People ex rel Muir vs. Throop*, 12 Wendell (N. Y.), 183:

Cook on Corporations, sec. 511.

The Supreme Court has power by mandamus to compel the officers and directors of a corporation to permit a shareholder to inspect the books and papers of the corporation, other than the transfer books.

Matter of Steinway, 31 App. Div. (N. Y.), 70.

First Dept., June term, 1898; opinion by Patterson, J. O'Brien and McLaughlin, J. J., concurred; Van Brunt, P. J., and Ingraham, J., dissented.

This decision was sustained by the Court of Appeals, 159 N. Y., 250, the court laying down the rule that:

"The Supreme Court has the power, upon the petition of a stockholder, to compel by mandamus a domestic manufacturing corporation to exhibit its books for inspection."

The party damnified has the right to proceed either by way of mandamus, or he may maintain an action for damages against the obstructing officers.

Legendre vs. The New Orleans Brewing Association, 45 La. Ann., 669.

The principle which is the basis of the right of the stockholders to inspect the books of the corporation seems to relate to the common ownership by the stockholders; but this right, as has been shown, may be

exercised only in consonance with the ancient and now thoroughly approved maxim, "*sic utere tuo*," etc. Accordingly, the courts, both of this country and England, in the issuance of the compulsory process, viz., mandamus, require as a prerequisite that the stockholder seeking information shall state the purpose of the desired investigation. The exaction of that condition precedent is beneficial to the stockholders as such because it debars useless and often antagonistic inspections of its affairs, commonly known as "fishing expeditions." This phase of the subject has already been touched upon, to some extent, in this chapter.

In *re Burton and the Saddlers' Company*, 31 Law Journal, Queen's Bench, 62, the court, by Mr. Justice Clark, says:

"I take the result of the cases to be that a mandamus may go against a corporation to inspect and see whether a stockholder can raise a particular case in his favor by examining the books. It must be, in my view, a case with reference to some defined, distinct dispute, as to which it appears that it might be to his advantage to see the minutes of the corporation."

The rule above stated limits the right materially, and appears to be less liberal than the view adopted generally in the State and Federal courts.

In this decision Mr. Justice Clark continues:

"In mandamus, the relator must in all cases establish a specific legal right, as well as the want of a specific legal remedy."

Referring to the remedy, a leading decision affirms

the right of the Supreme Court to issue the writ of mandamus in aid of a stockholder, permitting inspection of corporation books, etc., whenever in the sound discretion of the court such order is just and proper (*i. e.*, when required for the purpose of preserving the rights and interests of the stockholders).

Matter of Fitch, 160 N. Y., 87.

Perhaps no more fitting close of this chapter is possible than to cite an able decision which, while it is not the voice of the highest court of New York, still contains in direct and forceful words "the conclusion of the whole matter," viz.:

Application for mandamus by stockholder to enforce his right to inspect the corporation books is addressed to the sound discretion of the court, and is only granted in furtherance of justice.

See,

In re Pierson, 44 App. Div. (N. Y.), 215.

**Recent decisions confirmatory of the text.** — For an affirmance of the right to examine books, etc., see the recent decisions (not as yet reported) by the U. S. Supreme Court, in the Paper Trust and Tobacco Trust cases.

See, also, like ruling by the Missouri Supreme Court in the litigation prosecuted by Attorney General Hadley in the name of the State of Missouri against the Standard Oil Company of Indiana, the Waters-Pierce Oil Company and the Republic Oil Company, both of the last-named corporations holding their charters under the laws of the State of Missouri.

## CHAPTER XIX.

## Stockholders' Rights and Wrongs Enumerated.

Difficulty of task imposed. — Rights as enumerated by text-writers. — General classification of wrongs. — Instances of wrongs. — Source of the majority of wrongs. — Distinction noted. — Enumeration of wrongs. — Wrong usually involves infraction of trust relation. — A leading case quoted. — Reference to further treatment elsewhere.

Difficulty of task imposed. — Probably no task less easy of performance can confront a text-writer than to enumerate all the rights and wrongs of the stockholder.

The question has been treated of at length in all, or nearly all, the leading authors on Corporations, and with the exception of new developments resulting from changed conditions, the resulting classification is reasonably satisfactory, even if not altogether conclusive.

Rights as enumerated by text-writers. — Those defined in the text-books are the right

(a) To have due notice of, and vote at meetings



of stockholders, and to that extent participate in the actions of the corporation.

(b) To receive dividends from the corporation's surplus.

(c) To have a certificate evidencing ownership of stock.

(d) To assign and transfer the shares represented by such a certificate, and to have the same duly recorded upon the books of the company.

(e) To inspect the books and papers of the company, and to have such information of the business transactions of those managing and conducting the corporate business, as may be reasonably necessary for the stockholder to safeguard and protect his interests.

(f) To appeal to the courts for protection when wrongs are about to be imposed, or for relief when such wrong has been effectuated.

(g) To demand and insist that the corporation, its business and affairs, shall be carried on strictly *infra vires*, viz., for the objects and purposes of its creation and according to its charter and by-laws, with "equal rights for all and favors to none."

**General classification of wrongs.** — The wrongs of stockholders are equally numerous, and in general may be said to be the deprivation of any right. Two separate and distinct classes present themselves, viz.:

1. Those which pertain strictly to the stockholder as an individual member of the body corporate; and,

2. Those which pertain to him in common with all his fellow stockholders.

**Instances of wrongs.** — Instances of the first class are the following: The withholding of a dividend already declared and paid to other stockholders; or the refusal upon demand to register a transfer of stock. Under this head falls every other grievance wherein the matter in difference is between the company and the individual.

Of the second class it is sufficient to say that they consist of those instances wherein the stockholders are injured as a class and in which the injury reaches out and beyond the individual and extends in like manner to every stockholder of the corporation who is not a participant or an acquiescent in the wrong complained of.

The name of the latter class of wrongs is legion, and to specifically enumerate them all would be an impossibility. The reason for this inability is apparent when we consider that they represent the desire to overreach and oppress, and that they vary with every shade of opportunity which the circumstances afford, and with every degree of cunning and audacity displayed by the persons concerned in the several schemes.

**Source of the majority of wrongs.** — The wrongs that occur to stockholders principally come to them by reason of *ultra vires* acts, or through the oppressive conduct of the directors, supported, in most cases, by a majority of the stockholders; sometimes the acts

savor of omission, but those which are overt constitute the overwhelming majority.

**Distinction noted.** — While there is, theoretically, a distinction between wrongful acts committed by majority-stockholders and those of directors, officers and agents, the point is not particularly material, for the reason that the directors owe their position to, are sustained by and, in brief, are the spokesmen of the majority of the stockholders. Thus it is seen that in almost all instances where a wrong is suffered by a minority-stockholder,—practically, and in its origin, it is the act of both the directors and the majority stock-interest.

**Enumeration of wrongs.** — Among the specific things which, when done in contravention to stockholders' rights, the courts have from time to time taken cognizance of are the following, viz.:

(a) Selling the entire assets and franchise of the corporation.

(b) Issuing bonds and securing payment thereof by mortgage upon the corporate property.

(c) Buying the property of other corporations or a controlling interest in their stock.

(d) Transferring the control of their company to a so-called "holding company," and thus extinguishing the minority stockholders' voting right, etc.

(e) Terminating the corporation's existence by various manipulative methods, including consolidation,

merger, combination and amalgamation with other corporations.

- (f) Resisting payment of claims.
- (g) Payment of claims.
- (h) Declaring and paying dividends.
- (i) Refusing to declare and pay dividends.
- (j) Appropriating money or property by directors or officers to their own use.
- (k) Subordinating the business and interest of the corporation to that of others.
- (l) Material divergence from the line of procedure laid down in the laws, the charter and the by-laws.
- (m) Any *ultra vires* act, *i. e.*, carrying on the business of the corporation for any purpose other than that for which it was created.
- (n) Any act which, while technically *infra vires*, is at the same time oppressive in its nature; or unjust, injurious or inequitable toward the corporate body as a whole, or toward the minority interest.

The foregoing list, as has been said, is of necessity incomplete, since human ingenuity is always at work evolving new schemes and means of attack upon the citadel of corporate existence; and few cases arise in which novel complications or features, until then unheard of, do not appear.

**Wrong usually involves infraction of trust relation.** — The relationship between the directors and the stockholders (without a majority of whom these

wrongful acts can rarely be perpetrated), is, as has been seen, a fiduciary one, and is governed generally by the principles and rules which mark the relationship of trustee and cestui-que-trust. With this doctrine well established and clearly in mind, it appears in general that acts which violate the rules governing the actions of trustees concerning their trust-estates and their cestuis-que-trustent are wrongs; and this denomination includes all prohibited acts, whether *ultra vires* and clearly unlawful, or whether numbered among those myriad forms that, while not technically *ultra vires*, are yet, as we have seen, oppressive in their nature and subversive of the interests of the stockholders. In all such cases the courts are open to protect the injured party and redress the wrong.

Of the various forms of oppression, the method most often adopted by the directors, aided and supported by the majority of the stockholders, consists of a wrongful combination, properly classed as a conspiracy; and it will be found in practice that almost all of the series of transactions by and through which the minority stockholder is mulcted, fall within that class.

See in this connection, Chapter XXII., "Amalgamation, Combination," etc.

**A leading case quoted.** — In a leading and extensively cited Pennsylvania case, *The Morris Run Coal Company vs. Barclay Coal Company*, 68 Penn. State, 173, Mr. Justice Agnew said:

"In all such combinations where the purpose is in-



jurious or unlawful, the gist of offense is the conspiracy. \* \* \* Men can often do by the combination of many what severally no one could accomplish, and even when done by one would be innocent. \* \* \* There is a potency in numbers, when combined, which the law cannot overlook when injury is the consequence."

This apt language was quoted by Mr. Justice Harlan in the Northern Securities case.

Reference to further treatment elsewhere. — The reader who desires to assure himself that there is "balm in Gilead" should consult the closing chapters, beginning with Chapter XXI., wherein it is believed that there has been set out a faithful epitome of what the courts have done in the protection of stockholders' rights in times past, and what there is every reason to believe the courts will continue to do,—in furtherance of the eternal principles of justice and right.

## CHAPTER XX.

## Ratification, Acquiescence, Laches, Estoppel.

Distinguishment of these correlative terms. — When courts will refuse relief. — Estoppel defined. — Principle of estoppel, as applied to corporative acts. — Periods of deferred action amounting to acquiescence, etc. — Presumption of ratification arises when benefits are received. — Presumptions same as with natural persons. — Knowledge must precede ratification, etc. — Equity follows the law. — Rule as to illegal acts. — New York rule as to subsequent purchaser. — Stockholder may confide in management, without laches.

Distinguishment of these correlative terms. — While the courts are open and ready to prevent or redress corporative wrongs, there are certain circumstances under which the remedial gates are closed; and this occurs in the cases when the applicant himself, either by act of commission or omission, has become responsible for his own debarring.

These acts may, in a general classification apart from other equity-requisites, be stated as:

- (a) Ratification.
- (b) Acquiescence.

(c) Laches.

(d) Estoppel.

Without going to the length of an extensive treatment of the subject of definitions, it may be proper at this point to define these various "bars," and give some general idea of their effect before citing the authorities which relate to subject in hand.

The stockholder may, in the first place, preclude himself from relief by an actual ratification of the act complained of; or he may acquiesce therein. While the former naturally presupposes a more affirmative, and therefore more important and effective act than mere acquiescence, in effect the results are identical; and in the various authorities we find the doctrine universally laid down that any stockholder having full knowledge of all the facts may so act in either of the ways above specified as to prevent a successful application to the court for assistance. By such confirmation of the injurious or to-be-injurious act, he condones in theory and practice any wrong which he has suffered or which may in future flow therefrom.

It is not within the scope of this work, however, to enter into the finer shades of meaning pertaining to the aforesaid terms. Yet it may be permitted to add that ratification stands for some open and determined act whereby the aggrieved has placed himself, after the accomplishment of the wrong complained of, in practically the same position as he would have occupied had he, at the inception thereof, been an active promoter and participant in the deed; while acqui-

escence, on the other hand, implies that since the performance of the questionable transaction it has met with his approval and sanction to the extent, at least, of a *quasi*-promise on his part that he will not object to its workings, and will be satisfied with the consequences it entails. The practical effect, however, as is very clear, is the same in either case; the stockholder so ratifying or acquiescing is debarred by the courts from objecting to the wrongful transaction and from holding the perpetrators responsible therefor.

With regard to kindred disqualification of laches, it is only necessary here to say that as the familiar rules and principles concerning the same are applied to the affairs of natural persons, so are they applied in matters corporate.

The last of these disqualifying elements is estoppel, to which subject the foregoing comments apply with equal force and effect.

Before adding the subjoined list of extracts from decisions and the text-writers, it is suggested that the confusion which often arises in the legal mind with regard to the subject generally, comes from disregard or inadvertence in the matter of the proper definition of the term "corporations,"—what they are and how they act,— as laid down in the courts.

In this connection, and to solve the difficulty referred to, careful reference should be had to the authorities quoted in Chapter I. of this work, where the subject will be found to be treated of quite fully.

It there appears, in substance, that a corporation is a useful quantity, created by the people through their legislatures and made a "legal entity," an "artificial person," governed by and according to the same rules and principles applicable to natural persons, so far as its inherent nature will permit.

This principle or doctrine runs through all the decisions and the text-books. With the same well in view, it follows as a natural sequence that the various rules and principles of law embodied in acquiescence, ratification, laches, estoppel, as well as presumptions, tortfeasance, and the like, apply to the persons natural or artificial in equal degree and to the same extent, within the limitation stated.

Common-sense and reasonable discrimination will indicate with clearness and certainty the point where their several capacities and qualifications diverge, and where, per force, the identity of the two persons, to wit, the artificial and the natural, must terminate.

When courts will refuse relief. — Stockholders of a private corporation may be denied equitable relief against acts of a corporation which do not concern the public, but affect only the interests of stockholders, and which, although *ultra vires*, are not *per se* illegal or *malum prohibitum*, when the stockholder asking for relief has assented to those acts or has acquiesced therein with full knowledge of the facts.

See

Skinner vs. Smith, 134 N. Y., 240.



"Acquiescence of a stockholder will not preclude a recovery in an action brought by him in a proper case for the benefit of such corporation, in respect of wrongs committed by the managing officers of said corporation against it for the benefit of another corporation in whom they are also officers. In such case, while the stockholder is nominally plaintiff he is only nominally so; the action is really between the corporations joined as defendants, the one as the party wronged, the other as the party which profited by the wrong."

Fitzgerald vs. Fitzgerald & Mallard Construction Co.,  
etc., 41 Nebraska Reps., 375 *et seq.*

Opinion by Ryan, J. (1894).

The above, an important case, has an exhaustive line of authorities on the subject, *quod vide*.

**Estoppel defined.** — Estoppel is, in an ancient book, defined as "the stopping of a man's mouth from speaking the truth."

Bridgeman's Equity Digest, Vol. I., p. 658.

**Principle of estoppel as applied to corporate acts.** — The subject of estoppel, as applied to corporations, is thus instructively treated in

Herman on Estoppels, sec. 1223 (1886):

"A corporation may become bound and estopped otherwise than under a corporate seal, and their undertakings and admissions may be evidenced otherwise than by records, resolutions, by-laws, ordinances, or other written documents. Technical as well as equi-

table estoppels apply to corporations as well as to individuals. The ratification of a contract by a corporation may be inferred from acts attending the transaction, and where persons assuming to act as agents of a corporation, but without legal authority, make a contract and the corporation receives the benefit of it and uses the property acquired under it, such acts will ratify the contract and render the corporation liable thereon. Corporations, in regard to their contracts, are upon the same basis as natural persons, open to the same implications, receiving the benefit of the same presumptions."

See *ibid*, sec. 1223.

"The well-settled rule may therefore be thus formulated: Where a corporation, public or private, has lawful power to issue negotiable securities, such as city, county, township and other bonds, or bonds secured by deeds of trust and mortgages, a *bona fide* holder for value has the right to presume that the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recitals. Such corporation cannot take advantage of any irregularities in their issue as against the public, who were justified in believing *omnia rite esse acta*. They cannot deny that which their agents have affirmed in order to place them on the market."

*Ibid*.

"The fulfilment of the conditions or restrictions under which a body corporate is empowered to act will be presumed until it is disproved. When a corporation has power under any circumstances to issue negotiable securities, a *bona fide* holder has a right to presume that they were issued under circumstances which gave the requisite authority, and they are no more liable to be impeached for any irregularity in the hands of such a holder than any other commercial paper."

The section also touches the question of presumptions.

Ibid., sec. 1238.

"Where a corporation has the power to do an act they may be estopped from objecting that the form they adopted was not the exact mode prescribed in the charter; but where the question is one of power, they cannot be deemed estopped to deny that they have done what they never could by legal possibility have done. But if the agents of a railroad company represent the company to the public as common carriers to a place beyond the limits of their own road, and in such a manner and for such a time that the corporators may be presumed to know and assent to it, the company will be estopped to deny it, although no actual arrangements with connecting lines exist, although the company may have had no special authority by their charters to make such contracts, and could perhaps by proper proceedings have been restrained from so doing. They cannot plead such want of authority against persons contracting with their agents, empowered so to

contract by express act of the company or their directors, or by implication arising from a mutual arrangement among all the carriers, between the place where the goods are received and the place where they are delivered, and although the agent making such a contract has no authority from the company to do so, yet if for several years before and after the transaction sued upon he made similar contracts to deliver goods at various places beyond the line of the company's road, their assent may be presumed, and they will be estopped from denying their authority. Thus a railroad company contracted to carry sixteen carloads of cattle from St. Louis to Philadelphia, and nothing was said about the change of cars or other companies. It was held that, unless forbidden by its charter, it might make a contract to carry cattle over connecting lines, and it would be liable in all respects upon other lines as on its own. The public has a right to assume that the contracting company has made all arrangements necessary to the fulfilment of the obligations it has assumed."

*Ibid.*, sec. 1238.

**Periods of deferred action amounting to acquiescence, etc.** — Acquiescence for more than four years in acts done by a corporation in excess of its charter powers, it was held in Arkansas, will prevent a stockholder from successfully objecting thereto.

*Ex parte Booker*, 18 Ark., 338.

The decision is by Mr. Justice Hanly.

Action by shareholder against the directors, in equity, exists independently of any statute law, and in New York, under the code, it is not barred until ten years after the cause of action accrued.

Brinkerhoff vs. Bostwick, 99 N. Y., 185.

As to the length of time, where there is no bar by the statute of limitations,—a court of equity will never lay down, as a general proposition, that though the fact that an imposition has been practised is established, the party is too late.

See opinion of Lord Chancellor Erskine, in

Morse vs. Royal, 12 Vesey, 355, 373.

In a case where the element of fraud did not enter it was held that five years was too long to wait.

Kitchen vs. The St. Louis Ry. Co., etc., 69 Missouri, 224.

In regard to stockholders, it was held that a lapse of six years is not a bar to a stockholder's action.

Covington, etc., vs. Bowlers Executors, etc., 9 Bush, 570.

The cases have held as disqualifying limitations terms varying from eighteen months to twenty years; but the consensus of the various opinions seems to fix the term at three years.

Danienmeyer vs. Coleman, 11 Fed. Rep., 99.

Stockholders having claims against a corporation have a right to await the determination of pending suits on similar claims without being charged with laches.

Boardman vs. Lake Shore Ry. Co., 84 N. Y., 157.



**Presumption of ratification arises when benefits are received.** — A party is sometimes estopped from alleging that his contract with a corporation is *ultra vires* when he has received a benefit therefrom.

Maryland Savings Inst. vs. Schroeder, 8 Gill and J. (Md.), 93.

Booth vs. Robinson, 55 Md., 419.

The latter case is important. The opinion of Alvey, J., discourses very ably on the subject of directors' derelictions, as connected with the subject in hand.

Presumption of ratification arises from slight circumstances, when the unauthorized act is already beneficial to the corporation.

**Presumptions same as with natural persons.** — Corporations are held subject to the same presumptions as in the case of natural persons.

Hall vs. The Union M. F. Ins. Co., 32 N. H., 299.

Gilbert vs. Manchester, 55 N. H., 298.

A corporation can make a ratification, or raise an estoppel against itself, as well as an individual.

Kneeland vs. Gilman, 24 Wisconsin, 39.

If a cestui que trust concurs in the breach, he is forever estopped from proceeding against the trustees for the consequences of the act.

Lewis on Trusts, Chapter XXX., secs. 1 and 2.

**Knowledge must precede ratification, etc.** — But he must have had the means of knowledge that the act involved a breach of trust. \* \* \* The remedies

are assigned upon the supposition that the cestui que trust has not concurred, acquiesced or confirmed the act.

Ibid.

In order that there may be ratification, there must be knowledge.

First Nat. Bank of Fort Scott vs. Drake, 29 Kansas, 311.

“Confirmation” (or ratification) “must be a solemn and deliberate act.”

Lewin on Trusts, *supra*.

Equity follows the law. — Courts of equity, in cases of concurrent jurisdiction, usually consider themselves bound by the statute of limitation which governs courts of law in like cases, and this rather in obedience to the statute of limitations, than by analogy.

Godden vs. Kimmell, 99 U. S., 201, 210.

The foregoing is in accord with the maxim, “Equity follows the law.”

“Laches and the statute of limitations are set up in argument, but such defenses cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears the suit was commenced within a reasonable time after the evidence of the fraud was discovered.”

Meader vs. Norton, 11 Wallace, 442,—  
opinion by Mr. Justice Clifford.

Rule as to illegal acts. — It never can be held that the acquiescence in illegal acts by the original holder

of stock will bind a subsequent holder of that stock to submission to all future acts of the same character.

Opinion of Lord Chancellor Chelmsford, in  
Bloxam vs. Met. Ry. Co., L. R. 3, 3 Chan. App., 337.

Assent of all the stockholders cannot legalize an act which is *malum prohibitum*.

Kent vs. Quicksilver Mining Co., 148 N. Y., 159, 187.

**New York rule as to subsequent purchaser.** — A stockholder is not deprived of the right to sue by reason of the fact that he did not purchase his stock until after the commission of the acts complained of.

Frothingham vs. Broadway and Seventh Ave. Ry., 9  
Civ. Pro. R. (N. Y.), 304.

In the above Mr. Justice Van Brunt said that the objection to plaintiffs' right to bring an action, because they were not stockholders at the time of the commission of the acts complained of, has never been recognized by the courts of this State.

The decision is in part:

"It would indeed be a great hardship if a wrong having been committed against the stockholders of a company that all power to redress that wrong should cease because of a transfer to an innocent holder of such stock. This would be reversing the rule that the transfer of property includes the ownership of all incidents thereto."

Hence it appears that estoppel is not an incident or nor to be implied from change of ownership in New York.

In the above case the learned justice cites  
Young vs. Drake, 8 Hun., 61.

Williams vs. Western U. T. Co., 93 N. Y., 162.

Barr vs. Y. L. E. & W. R. R., 96 N. Y.

Whitney, etc., Co. vs. Barbour, 63 N. Y., 62.

Another leading case in New York, to the same effect, is

Ramsay vs. Gould (57 Barb., 398), *supra*.

Stockholder may confide in management, without laches. — In Stanhope's Case L. R., 1 Chancery, 161, 169, Lord Chancellor Cranworth has well said:

"It is no part of the duty of a shareholder to look into the management of the business; he has a right, acting on the terms of the deed, to leave the management in the hands of those to whom he had confided it, and to assume they were doing their duty. It is not enough to show that they might have become acquainted with the mismanagement of their affairs. It must be shown that they did so."

Having seen under what circumstances parties are free from fault and able to proceed in defense of rights or in redress of wrongs, it will be our care in the following chapter to discourse somewhat upon the nature and extent of the beneficial results which flow from existent remedies for corporative oppression in its familiar forms.

## CHAPTER XXI.

## The Remedies for Stockholders' Wrongs; what they are, and when Applied.

Consideration of remedies is necessary as well as pertinent. — This subject belongs to equity. — Lord Hardwicke's decision in a leading case. — Remarks suggested by same. — Oppression by directors most common source of complaint. — Difference between general and local text-books considered. — Remedies classified. — Distinction between stockholders suing individually and as a class. — Broadness of relief in equity. — General consideration of remedy for oppression resumed. — Notice to corporation as a condition precedent to suit. — Stock newly bought and for ulterior object carries right to sue. — Equity protects small holder. — Reaches abuse of joint control. — Principles and authorities generally.

Consideration of remedies is necessary as well as pertinent. — Having spoken of the wrongs occurring to stockholders, and the violation of their established rights, an examination of the subject of the remedies which may be applied for their prevention and redress



becomes not only appropriate and pertinent, but necessary.

**This subject belongs to equity.** — From the outset it will be noticed in this chapter that equitable principles and rules are invoked in such cases; for in all English-speaking countries the Court of Equity remains the tribunal where corporative affairs, and particularly the abuse of the fiduciary relation, are brought for regulation and correction.

**Lord Hardwicke's decision in leading case.** — The justly styled Father of Equity, Lord Hardwicke, in 1742, in the much-cited case of

*Charitable Corporation vs. Sir Robert Sutton*, 2d Atkyns, 400,

said: "There can be no injury but there must be a remedy." Since his day, throughout the intervening period of more than a century, the same righteous doctrine has been enunciated by other jurists, until it has become one of the axioms of equity law.

**Remarks suggested by same.** — Perhaps it may be useful to repeat, as a species of corollary to the foregoing, that the greater part of the losses which have fallen upon stockholders because of oppressive acts by directors, or directors and the majority stock-interest in combination, have occurred through no fault of the law, nor from the want of power, nor from any want of disposition on the part of the judiciary to prevent or punish those wrongs, but from the failure of the injured parties themselves to confide their inter-

ests to the courts and to prosecute their cause with vigor.

A stockholder who finds that he is about to suffer some wrong, and who is himself free from the disabilities mentioned in Chapter XX., "Ratification," etc., and who possesses "clean hands,"—may with confidence ask for relief in Equity.

And in this connection it may be said that the powers of a Court of Equity are so broad and elastic as to reach every wrong. It will be found in practice that the courts will not take cognizance of mere matters of judgment and business. It is only where acts have been accomplished, or are threatened, which are so injurious or oppressive to the complaining stockholder as to be clearly subversive of justice and equity, that Courts of Equity will stretch forth a helping hand.

A clear understanding of this distinction is necessary, for many litigants have failed because they did not perceive the inherent nature of those proper cases wherein Equity will interfere.

To the directors is given the management of the business of the corporation; in them is reposed the fullest faith and confidence within the scope of the charter and of the laws applicable thereto; within those limits, when joined to the exercise of sound discretion and good faith, the judgment of the directors cannot be gainsaid. But acts *ultra vires*, gross improvidence, fraud, collusion, partiality, wrongful discrimination, oppression, transactions contrary to the rules governing persons acting in a fiduciary ca-

capacity, or conduct clearly subversive of the interests of the stockholders whom they represent, to an extent indicating *malafides* in any of its hateful forms,—when they perpetrate or permit of these things then such directors are, in the eyes of the court, acting wrongfully. The aggrieved shareholder may then appeal to Equity to prevent the threatened or impending wrong, or to redress the wrongful act if already accomplished.

Nor will it avail the wrongdoer to accomplish his object by subterfuge, for

“It cannot be permitted that one may effect a prohibited result by indirection which he may not accomplish by direct means.”

East St. Louis Connecting Ry. Co. vs. Jarvis, 92 Fed. R., 735.

Oppression by directors most common source of complaint.—The courts have been most frequently called upon to apply remedies in cases arising from the misdeed of directors.

“The courts will interfere at suit of a stockholder to prevent corrupt or unlawful acts by directors who have entire control of the corporation and conduct its affairs for their individual benefit.”

Watkins vs. Watkins, etc., 11 App. Div. (N. Y.), 517.

As we have seen in another place, Chapter XVI., “Stockholders Inter Sese,” and elsewhere in the text, suits against the corporation’s officers need not be

brought by themselves, in its name, nor is notice of intent to sue required.

“Even if the directors and officers were willing to prosecute, it would be a mockery to permit a suit against themselves to be brought and prosecuted under their management.”

Ryan vs. L. A. & N. W. Ry. Co., 21 Kansas, 404.  
Opinion by Horton, Ch. J.

In

Holmes, Booth & Hayden Co. vs. Willard, 125 N. Y.,  
75,

Mr. Justice Earl made a distinction between the corporation and the stockholders, holding that while a corporation may not maintain an action against the officers for carrying on *ultra vires* business, the stockholders can institute such a suit.

**Relief afforded by courts of equity in such cases. —**

In support of the statement hereinbefore made as to the power and disposition of Courts of Equity to apply remedies for wrongs, we quote again from Lord Hardwicke as follows:

“Nor will I ever determine that a Court of Equity cannot lay hold of every breach of trust, let the person be guilty of it either in a public or a private capacity. \* \* \* Nor will I determine that frauds of this kind are out of the reach of Courts of Law or Equity, for an intolerable grievance would follow from such a determination. \* \* \* In the present case one thing is clear, \* \* \* the five men who

were engaged in that conspiracy are certainly liable to make good the losses which the corporation sustained in the first place, and the committeemen (directors) who were not parties in the affair are liable in the second place only. \* \* \*

Charitable Corporation vs. Sutton, 2d Atkyns, 400, *supra*.

This justly celebrated and leading English case shows the great extent to which the English High Court of Chancery has gone in applying potent and even drastic remedies to corporate misdeeds, and its readiness to afford remedies to protect the interests of stockholders. In its purpose, the corporation at bar in that case was closely analagous to our present business corporation. It was formed for the purpose of lending money upon securities and other property. The acts of the five committeemen (directors), which were the subject of the litigation, consisted of loaning the corporation's money to themselves upon property shown to be wholly inadequate. In his disposition of the case the great Lord Chancellor said: That he should instruct the master to inquire who of those committeemen (directors) performed the acts complained of, and that they, or if deceased, their representatives, should be held liable to the corporation in the first instance; while those committeemen who were "supinely negligent" should be held secondarily liable.

The influence of this early and salutary application of basic principles to corporative matters has been



potent for good in the English and American courts down to the present day. National prejudice should not lead us into the error of belittling the results which have flowed from this and other clear, lofty and correct enunciations of the Chancellors. The responsive feeling aroused in our own courts has led to benefits beyond the power of computation. It has bred confidence in corporate bodies, and these have been the engines through which the changes necessary to develop a continent have been effected. The prestige acquired through the fairness and vigor of those early decisions continues down to the present day. In matters affecting corporations, in so far as abstract law is concerned, the Equity Courts of this country have in general adopted the attitude and followed the decisions of their predecessor, the Court of Chancery of England.

That there is at this time danger of sinning against the Providence which so opportunely timed this influence for good, at the very inception of our existence as a people, cannot be gainsaid. Loose corporate methods have been aggravated by faint objection, and by a careless application of underlying principles. It has been the purpose of this book to point out and to recall to mind the true rule which should govern in such cases.

The courts will interfere and apply the appropriate remedy where the directors of a corporation make contracts with themselves and those with whom they

stand in confidential relation, and which appear to be directly or indirectly for their own benefit.

See,

McGourkey vs. Toledo and O. R. R. Co., 146 U. S.,  
536.

Semble,—any arrangement by which the directors become interested adversely to the corporation the court will declare void, at the instance of the corporation or of the persons whose rights are sacrificed.

*Ibid.*

The action,

McClure vs. Law, 161 N. Y., 78,

was a case where the president of a corporation had sold to an outside interest his office as director and president. The receiver of the corporation applied to the court, through an action against the ex-president, to recover the purchase price,—three thousand dollars; and the court held that the president must not be permitted himself personally to profit by reason of his official position, and adjudged that the money belonged to the corporation.

Nor will the courts permit directors of a corporation who are “tort-feasors” and have wasted the funds of their corporation to escape liability, even though the board of directors formally release them from liability.

Gilbert vs. Finch, 173 N. Y., 455.

It is not to be understood that all such transactions as the above will be set aside by the courts “of course,”

nor that directors participant, in all instances, will be held liable for resultant loss or damage; the severe rule governing those occupying fiduciary relations is applied only to the case of a director who, with knowledge, acts and deals with himself and makes to himself or his friends a benefit or advantage (or is about to do so), however small, and who entails a corresponding loss to the stockholders. Then, and in all such cases, the court will interfere and apply the appropriate remedy, either of prevention or of redress. And, furthermore, the fact that a stockholder owns but a small part of the corporation stock will not stand in the way of his asking the court for and receiving from it remedial justice when it appears he has suffered, or is about to suffer, an injury. The right of one stockholder is as sacred in the eyes of the court as that of many.

Nash vs. Hall, 11 Misc. (N. Y.), 468,

affirmed in

90 Hun., 354;

Cook on Corporations, Chapter XLV., par. 735, p. 1597, and in cases cited in note.

Cook on Stock and Stockholders, secs. 643, 662.

Though the majority stockholders own substantially the whole of the stock,—even then the minority stockholder must not be deprived of his right to invoke equitable protection or relief.

Buffalo L. T. & S. D. Co. vs. Medina Gas, etc., Co., 162 N. Y., 67;

Saranac and L. P. R. R. Co. vs. Arnold, 167 N. Y., 368.

A minority shareholder has the right to restrain threatened transaction by majority shareholders, when the result would be clearly detrimental to his corporation.

“To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be plainly made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests.”

Opinion by Mr. Judge Peckham in the case of Gamble vs. Queen's County Water Co., 123 N. Y., 91.

In brief, Courts of Equity in their calculation of what is great or small are governed, not by the amount involved from a property standpoint, but by their estimate of the principles at stake in the particular instance before them.

Also, where two corporations are under the same control, and are so conducted as to sacrifice the interests of the one to advance those of the other, the

court will grant relief against the situation at the instance of the person or persons damnified.

Gamble vs. Queen's County Water Co., 123 N. Y., 91.

"It is true that courts of equity will not interfere to settle a case of mere administration or of policy upon which there might be a difference of opinion; but the matter proposed is different where the majority of a corporation propose to benefit themselves at the expense of the minority."

Ibid.

Menier vs. Telegraph Co., L. R., 9 Chancery, 350.

While a majority of the stockholders (through the directors) may legally control the company's business, yet, in so doing, they cannot manipulate the business in their own interests to the injury of the other stockholders.

Mayer vs. Staten Island Ry. Co., 7 St. Rep. (N. Y.), 245.

A corporation cannot gratuitously condone or release the fraud of a defaultive officer, except by a unanimous vote of its stockholders.

Hazard vs. Durant, 11 R. I., 195 (1875).

In England, the courts will not permit directors to avail themselves of their position to enter into beneficial contracts with the company.

Great Luxembourg Ry. vs. Maguay, 25 Beavan, 586.

Aberdeen Ry. vs. Blaikie, 1st Macqueen H. L., 461.



Flanagan vs. Great Western Ry. Co., 19 L. T. N. S.,  
345.

A Court of Equity will interfere and protect minority stockholders on application.

Cook on Stock and Stockholders, secs. 643-662,  
and cases cited.

A favorite modern device for defrauding investors is the "purchase" by one corporation of the stock of another.

*Ibid.*

Courts will review such contracts, and if fair, sustain them; if unfair, will "undo it."

*Ibid.*, sec. 662.

The Courts of Equity are ready and reliable in remedying the wrong, whenever the fraud can be proved.

*Ibid.*, secs. 643-662.

"The law requires of the majority of the stockholders the utmost good faith in their management and control of the corporation as regards the minority, and in this respect the majority stand in much the same attitude toward the minority that the directors sustain toward all the stockholders; thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for the majority to manage the affairs of the first corporation for the benefit of the second."

Jacobus vs. American Mineral Water Machine Co.,  
38 Misc. (N. Y.), 371; 77 N. Y. Supp., 898.

"While a shareholder may ordinarily vote his own stock in his own interest, the result of such shareholder's vote must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority stockholder lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority. In such cases the action of the majority will be scrutinized by a Court of Equity."

Gamble vs. Water Co. (123 N. Y., 91), *supra*.

The courts have held that directors who have violated their obligations as such, and mismanaged the corporation of which they are officers, etc., are liable to the corporation for breach of trust.

Stahn vs. Catawba Mills, 53 S. C., 519 (1898).

Farmers Loan and Trust Co. vs. N. Y. & N. R. R. Co., 150 N. Y., 410.

De Neufoille vs. N. Y. & N. R. R. Co., 81 Fed. Rep., 10.

Pondir vs. N. Y. L. E. & W. R. R. Co., 72 Hun. (N. Y.), 384.

"\* \* \* directors are personally liable to the corporation, or in a proper case to any stockholder, for losses arising from their fraud, breach of trust or gross negligence in the management or disposition of the corporate property; and any person or corporation participating in such fraudulent conduct, or corruptly

receiving the corporate property, fraudulently disposed of, is likewise liable."

In the leading New Jersey case of  
Wilds vs. Rural Homestead Co., 8 Dickinson (N. J.),  
425,

the learned and distinguished chancellor quoted Green, V. C., and said, in effect, that acts of corporate directors in pursuance of a "scheme," even though in themselves *infra vires*, will be set aside by a Court of Equity, if conspicuously unwise and injurious to stockholders. Individual stockholders cannot question in judicial proceedings the corporate acts of the directors if the same are within the powers of the corporation and in furtherance of its purposes, and are not unlawful, and are done in good faith and in the exercise of good judgment.

"Questions of policy, of management, of expediency, of contract or actions, of adequacy, of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of theirs."

Ibid.

A sale by a trustee directly or indirectly to a corporation in which he is a large owner is as fraudulent as an outright transfer to himself.

Robbins vs. Butler, 24 Ills., 387,

St. James' Church vs. Church of the Redeemer, 45 Barb., 356.

The last-named case was argued at General Term, N. Y. Supreme Court (1865), before Leonard, Ingraham and Barnard, J. J.

In the decision Mr. Justice Leonard said:

"When the same person acts in a double capacity as agent or trustee, he must see to it that the transaction is fair and unexceptionable as regards either of the parties he so represents. If any motive of personal convenience or interest has been subserved, it will constitute a badge of fraud."

See also:

Perry on Trusts (5th Ed., Boston, 1899), Vol. I., sec. 207, p. 302,

and long list of cases in point.

Carter vs. Bruce, 46 N. J. Law, 134.

affirmed in

47 N. J. Law, 597.

One of the three grounds for the exercise of equity jurisdiction is the existence of a fiduciary relation.

Marvin vs. Brooks, 84 N. Y., 71, 80;

Story's Equity Jurisprudence, 13th Ed., sec. 465, and note to page 471.

Concerning the remedies themselves, as we have seen, courts of equity take cognizance of all fiduciary matters pertaining to corporate affairs, and it is in those tribunals that the injured stockholder must seek relief. They alone can apply the remedy which the

facts of the case warrant and call for. In sequence to this the question arises,—what are those remedies?

**Difference between general and local text-books considered.** — In construing the following pages, which contain the answer to this most natural enquiry, it is essential to a proper understanding of the subject as here treated that there should be distinctly and constantly in the mind of the reader the difference between a local work relating to the particular statutes of a single State, or group of States, and purporting to afford a working knowledge of the details involved in invoking such aid, and a book prepared for general application. This present work is not intended to give the various rules of practice in the several States; for while there is a similitude in the need to be reached, the practice in most instances is quite diverse,—each State having its own code of procedure or statutory rules applicable in such matters. In individual cases, as they arise, reference should be had to those text-books which contain the lines of correct procedure, or where such are wanting, to the decisions of the particular court whose aid or protection is sought.

It is only in those rare cases that are without a fitting rule or a precedent that the practitioner should depend for guidance solely upon a work of general application. Notwithstanding this technical difference, however, there obtain in the various States, as has been said, practically the same remedies, reached, however, in each by a somewhat different path.



**Remedies classified.**—The remedies which the Courts of Equity, both Federal and State, apply in corporate affairs may be generally classed as of three kinds:

(a) Those which are preventive,—that is, where an injury is in course of perpetration, or is about to be perpetrated.

(b) Those which compel the doing of some act, the non-performance of which will, with reasonable certainty, work an injury, and

(c) Those which afford redress for injuries which are already *un fait accompli*.

In the first class mentioned, the use of the writ of injunction is indicated; in the next the writ of mandamus; while in the last the remedy becomes operative through the judgment or decree of the court, obtained in an action in equity.

In addition to the foregoing, the courts, in the exercise of their inherent, long-recognized and well-established equity powers, will from time to time during the pendency of the action, or upon petition or in anticipation thereof, issue such remedial and proper orders, as in their sound discretion appear to be necessary and appropriate to preserve the *status in quo*, or to prevent injury and injustice. The varying states of circumstances in which such orders will be issued are so multitudinous and diverse as to utterly preclude any possibility of classification or enumeration; like the rays of light emitted by the solar lu-

minary, or the phases of the human mind,—they defy the power of numbers.

Distinction between stockholders suing individually, and as a class. — With regard to the right of redress for corporate wrongs, there exists a distinction between such right when invoked by the individual stockholder and when invoked by the stockholders as a class:

*First.*—In those cases where a stockholder has standing in court apart from his associates, there will be found on inspection to exist some matter or thing in which he is interested in distinction from any of his co-stockholders; as in a case where the corporation having made and declared a dividend and paid it to the other stockholders, refuses to pay him a like profit, or where it declines or neglects to issue to him a certificate of his stock; for it is plain in the instances given that this grievance is a personal one and affects him only.

*Second.*—The other class is where the injured stockholder suffers a wrong in common with his co-stockholders; in such cases, in theory of law, the wrong is done not to him individually, but to the whole corporation, and the right to pursue his remedy accrues to him not as an individual, but as the representative and a distributee of the corporation, which, in the eyes of the law, is the real party in interest, and the person damnified.

The familiar instance where the management, at the

suggestion and with the support of the majority, seeks an opportunity to exclude the minority from all voice in the corporate councils, or seeks to confiscate the share of the minority interest, is an illustration of a situation where the individual must seek his rights as the spokesman of the corporation as a whole.

A clear and well-defined understanding and appreciation of the foregoing distinction is absolutely necessary to the full and complete realization of the position occupied by the shareholder in litigation having for its object the remedying of corporate wrongs.

**Breadth of relief in equity.** — "Equity never placed any limits to the remedies which it can grant, either with respect to their substance, their form or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented or old ones modified, in order to meet the requirements of every case and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."

Pomeroy on Equity Jurisprudence, 2d Ed., sec. 111,

p. 115.

"It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases."

*Ibid*, sec. 170, p. 192.

In

Taylor vs. Salmon, 4 Mylne and Craig, 134, 141,

Lord Chancellor Cottenham said that a court of equity has the power and it is its duty to—"\* \* \* adapt its practice and course of procedure, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily taking place in the affairs of men, must continually arise, and not from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."

And here the Federal Court speaks with no uncertain voice.

See,—Chicago, Rock Island and Pacific Ry. vs. Union Pacific Ry., 47 Fed. Rep., 15, as follows:

"\* \* \* I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasing complex business relations and the protection of rights can demand. \* \* \* The powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop State or nation from spoliating or destroying private rights; to grasp with strong hand every corporation and compel it to

perform its contracts of every nature, and do justice to every individual."

The above opinion was by Mr. Justice Brewer.

As a general rule, presumptions which can apply to corporations as well as to individuals, apply alike to both, in a gain or loss, and in a solvent corporation each stockholder has a certain interest, though not certain as to amount.

A court of equity will, in some instances, give effect to the act of individual stockholders, on the ground of their beneficial interests, as in mortgages, etc., etc.

See

Clark and Marshall on Private Corporations, Vol. I.,  
sec. 7, p. 24,  
and cases cited.

**General consideration of remedy for oppression resumed.**—The leading case in this country on the question of suits by stockholders,  
Dodge vs. Woolsey, 59 U. S. (18 How.), 331 to 380  
inclusive,  
(syllabus) has the following:

"A stockholder in a corporation has a remedy in chancery against the directors, to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits which might lessen the value of the shares, if the acts intended to be done amount to what is called in law a breach of trust or duty."

"So, also, a stockholder has a remedy against indi-



viduals, in whatsoever character they profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law.

"Therefore, where the directors of a bank refused to take proper measures to resist the collection of a tax, which they themselves believed to have been imposed upon them in violation of their charter, this refusal amounted to what in law is termed a breach of trust. A stockholder had a right to file a bill in chancery asking for such a remedy as the case might require.

"If the stockholder be a resident of another State than that in which the bank and persons attempting to violate its charter, or commit a breach of trust or duty, have their domicil, he may file his bill in the courts of the United States. He has this right under the Constitution and laws of the United States."

The above is in this country what

*Foss vs. Harbottle* (2 Hare, 461)

is in England, and each marked a new era in the treatment of the affairs of corporations.

The opinion of the court in *Dodge vs. Woolsey* was delivered by Mr. Justice Wayne; Taney, Ch. J., McLean, Nelson, Grier and Curtis, J. J., assenting; Catron, Daniel and Campbell, J. J., dissented, but wrote no opinions.

Counsel for appellant (on his side), stated:

"It is definitely settled, however, by a great weight of authorities, that where the charter has invested the board of directors with power to manage the concerns of the corporation no stockholder, nor any number of stockholders, has a right to compel them, the charter agents of the body corporate, to do any act contrary to their own judgment, exercised in good faith."

Citing a large number of cases; *inter quos erant*,—

Hersey vs. Veazie, 24 Maine, 9;

Smith vs. Hard, 12 Metc. (Mass.), 371;

Robinson vs. Smith, 3 Paige Chan. (N. Y.), 22;

Russell vs. McLellan, 14 Pickering (Mass.), 63, 69;

Angel and Ames on Corporations, secs. 560-565;

Colquitt vs. Howard, 11 Ga., 556.

Counsel for respondent, in his answering brief, said:

"We claim under such circumstances a stockholder has a clear right to intervene."

Citing, Robinson vs. Smith, 3 Paige (N. Y.), 233;

Bayless vs. Orne, 1 Freeman (Miss.), 161;

Hichens vs. Congreve, 4 Russell (Eng. Chancery Reps.), 562;

Hodges vs. N. E. Screw Co. *et al.*, 1 R. I., 312;

Smith vs. Swormstedt, 16 How. (U. S.); 288;

Angel and Ames on Corporations, sec. 312.

Among the things settled by this case is the following:

"It is no longer doubted, either in England or the United States, that Courts of Equity, in both, have a

jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits which might result in lessening the dividend of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to enquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatsoever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise or the denial of a right growing out of it, for which there is not an adequate remedy at law."

Dodge vs. Woolsey, *supra* (59 U. S. [18 How.], 331).

Such acts must, however, be done through the instrumentality of officers or agents in such a manner as the charter or governing statute authorizes.

Citing, Talmadge vs. North Am. Coal Co., 3 Head (Tenn.), 337.

Assuming, then, that the charter or governing statute of a particular corporation is, under the Constitution of the United States and that of the particular State, within the powers of the legislature, it constitutes the index to the objects for which the corporation was created and to the powers with which it has been endowed. An exception to this principle is that

corporations became answerable, under many circumstances, for the *ultra vires*, fraudulent, or tortious acts of the officers and agents, though such acts are not authorized by their charter; and, as we will see hereafter, the rule is loaded down with other exceptions and qualifications.

See

The City of Aurora vs. West, 9th Indiana, 74; opinion by Perkins, J.

"Indeed it is too well settled to admit of question that a court of chancery has no peculiar jurisdiction over corporations to restrain them in the exercise of their powers, control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief.

"Their rights and duties are regulated and governed by the common law, which in most cases furnishes ample remedies for any excess or abuse of corporate powers and privileges which may injuriously affect either public or private rights. It is only where there is no plain or adequate remedy at law, and a case is presented which entitles a party to equitable relief, under some head of chancery jurisdiction, that a bill in equity can be maintained against a corporation. And this rule is applicable to stockholders as well as to other persons."

Opinion of Bigelow, J., in  
Treadwell vs. Salisbury Mfg. Co., 73 Mass. (7 Gray),  
393, 399.

Citing, Angel and Ames on Corporations, sec. 312;  
Grant on Corporations, secs. 7-271;  
Morley vs. Alston, 1 Phil. Ch., 790;  
Atty. General, etc., vs. Utica Ins. Co., etc., 2 Johns  
Ch. (N. Y.), 37 (1856).

In the notes to

People vs. Ballard (*supra*), 134 N. Y.,  
an extensive résumé was made and the question of  
the power of the Court of Chancery over corporations  
discussed,—*quod vide*.

While the decision applies most particularly to the  
State of New York, the general trend of all is to show  
and establish the fact that the Equity Courts have  
jurisdiction, in a special manner, over all corporate  
matters where the fiduciary relation exists.

In actions by stockholders of corporations which  
assail the acts of their directors or trustees, those  
courts will not interfere unless the corporate powers  
have been illegally or unconscionably executed, or  
unless it be made to appear that the acts complained  
of were fraudulent or collusive or destructive of the  
rights of stockholders. Mere errors of judgment are  
not sufficient grounds for equity interference.

Leslie vs. Lorillard, 110 N. Y., 519.

In

Erwin *et al.* vs. Oregon Ry. and Nav. Co., 20 Fed.  
Rep., 577,

the rule was applied. A majority of the stockholders  
who were authorized by law to dissolve the corpora-



tion and distribute its assets, undertook to pervert the forms of law by selling the property to themselves at an unfair appraisal.

It was held, that although the courts would not inquire into the motives of the majority as to those acts which were within the exercise of their legal powers, they had no right to sell the property to themselves at an unfair price, and they must account to the stockholders for its value.

Furthermore, that where a corporation is practically dissolved, and all its property sold by the action of the directors and a majority of the stockholders, the minority stockholders may maintain a suit in equity directly against the persons who have purchased the property for an accounting, without making the corporation a party, and further that in such an action one or more of the minority stockholders may sue without joining the others.

Ibid.

In

Ryan vs. L. A. & N. W. Ry. Co., 21 Kansas, 365, 404,  
it was laid down:

“Even if the directors and officers of these corporations were willing to prosecute, it would be a mockery to permit a suit against themselves to be brought and prosecuted under their management to obtain the relief sought in this action.”

Citing, *Heath vs. Erie R. R. Co.*, 8 Blatchford (U. S.), 347;

*March vs. Eastern R. A. Co.*, 40 N. H., 548;

*Dodge vs. Woolsey*, 18 How. (U. S.), 331, 341;

*Robinson et al. vs. Smith*, 3 Paige Ch. (N. Y.), 222.

Where the majority are illegally pursuing a course in the name of the corporation which is in violation of the right of other stockholders and cannot be otherwise restrained, equity will interfere.

*Barr vs. N. Y. L. E. & W. R. R. Co.*, 96 N. Y., 444.

"Mere knowledge that wrongs have already been committed, for which the corporation is entitled to redress in an action, would not deprive a transferee of his right to sue; nor would the fact that the vendor had barred himself alone bar a purchaser in good faith, unless the fact were known to him at the time. And the acquiescence of the original holder in illegal acts of the managing agents will never bind a subsequent holder of that stock to submit to future acts, whether of a similar or different character."

Spelling on Private Corporations, Vol. I., sec. 468, p. 507.

The courts have been careful not to define "fraud" so strictly that they might be estopped from preventing, punishing or remedying fraudulent transactions. See article, "Fraud," in *Encyclopædia Britannica*.

Notice to corporation, as a condition precedent to suit. — In Massachusetts, in *Doherty vs. Mercantile Trust Co.*, 184 Mass., 590, 593 (1903),

Loring, J., in conformity with the somewhat narrow rulings of the earlier cases, held:

"It is not enough to enable a stockholder to bring a bill to enforce, in behalf of a corporation, the rights which, if successful, will accrue to the corporation, to make a naked request that such a bill should be brought, without submitting to the directors the facts upon which it could be maintained;"

citing, among others,

Dilloway vs. Boston Gas Light Co., 174 Mass., 80,

Hawes vs. Oakland, 104 U. S., 450.

In Rhode Island it was held that a stockholder on refusal of the corporation to redress or prevent a wrong may sue for himself and his co-stockholders, making the corporation a co-defendant.

Hazard vs. Durant, 11 R. I., 195 (1875).

This leading case was brought by a stockholder of the notorious "Credit Mobilier Company of America." The main opinion was by Durfee, C. J., who discussed at considerable length the right of the stockholder to sue and the extent to which the corporation must have notice; the whole opinion should be read with care.

It supports the truly equitable doctrine laid down in Brinkerhoff vs. Bostwick, *supra* (88 N. Y., 52).

"In an action by a stockholder against the corporation, an application for redress within the corporation, and refusal, need not be alleged if it be shown that the directors or managing board are themselves the wrongdoers in some alleged breach of trust or fraud-

ulent misappropriation of the corporate property, and have a majority of the stock so as to control corporate action."

This quotation is from syllabus in—

Stahn vs. Catawba Mills, 53 South Carolina, 519 (1898).

This clear and concise opinion is by Mr. Justice Jones. It holds, *inter alia*, the following:

"We think the complaint shows facts from which the court could reasonably infer that plaintiff could not obtain redress within the corporation, in which case it is not necessary to allege facts showing an honest effort to procure corporate action."

In the case of

Wengel vs. Palmetto Brewing Co., 48 S. C., 80,  
the court (following

Latimer vs. Richmond R. R. Co., *post*)

declared the principle which must govern in such a case:

"The general rule undoubtedly is, that when the directors or managing board of a corporation are charged with mismanagement or misappropriation of the corporate property, the action to restrain or redress such wrong must be instituted by the corporation, since the conduct complained of is a breach of the trust relation between the directors and the corporation. But to this general rule there are well-recognized exceptions, viz.: When the directors or managing board do, or threaten to do, some act *ultra vires*, or some act

of oppression or illegality injurious to the corporation, or, in violation of the rights of stockholders, to prevent injustice a stockholder is permitted to maintain an action in his own name.

“This is substantially the rule declared in

Latimer vs. Richmond R. R. Co., 39 S. C., 44,

following and approving the principle announced in

Hawes vs. Oakland, 104 U. S., 450.

“Further, before a stockholder can maintain a suit in these exceptional cases he must show that he has endeavored to get redress of his grievances within the corporation, or he must show facts which would justify a court in concluding that an effort for redress within the corporation would be unavailing.

“It is also stated as a well-established rule that an application for redress within the corporation and refusal need not be alleged, if it be shown that the directors or managing board are themselves the wrongdoers in some alleged breach of trust or fraudulent misappropriation of the corporate property, and have control of a majority of the stock so as to control corporate action. In such a case it is reasonable to infer that an effort for redress within the corporation would be unavailing.”

Citing, Brewer vs. Boston Theater, etc., 104 Mass., 378, 387;

Eschwiller vs. Stovel, 78 Wis., 316 (S. C.);

Miner vs. Belle Isle Ice Co., 17 L. R. A. (Mich.), 417;



Also, *Wheeler vs. Pullman Iron, etc., Co.*, 17 L. R. A. (Ills.), 821;  
*Stahn vs. Catawba Mills*, *supra*.

The above is given *in extenso*, for the reason that it presents an able statement of what the rule is, in such cases, as laid down in the Federal Courts and, with one or two exceptions, in every State.

The principle we have noted in regard to the right of the injured stockholder to bring an action against the corporation, and affirming the distinction between suits by a stockholder individually and those brought by him as one of a class, *i. e.*, in behalf of himself and all the stockholders "similarly situated," is found in,—  
*Barr vs. N. Y., L. E. & W. R. R. Co.*, 96 N. Y., 444.  
*Niles, etc., vs. The N. Y. C. & H. R. R. Co.*, 176 N. Y., 119 (1903).

In

*Flynn vs. Brooklyn City R. R.*, 158 N. Y., 507,  
Mr. Judge Vann said:

"While courts cannot compel directors or stockholders, proceeding by the vote of a majority, to act wisely, they can compel them to act honestly, or undo their work if they act otherwise. Where the majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which even if lawful upon its face is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts may interfere and remedy the wrong.

Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action by the corporation; or, if it refuses to act, by a stockholder in its stead, for the benefit of all the injured stockholders."

If it appears that it would be useless to give the usual notice and make demand of the corporation to bring suit, the stockholder suing in his representative capacity need neither make the same nor plead it.

*Boaz vs. Sterlingworth Ry. Co.*, 68 App. Div. 1 (N. Y. Sup. Ct., 1st Dept., 1902).

Opinion by Mr. Justice McLaughlin, all concurring.

*Sage vs. Culver*, 147 N. Y., 241.

In general, the corporation must sue in respect to a claim, etc., but an exception is where a fraud is committed by persons who can command a majority of the votes; the reason is plain, as, unless such an exception were allowed, it would be in the power of the majority to defraud the minority with impunity.

*Mason vs. Harris*, L. R., 11 Ch. D., 97 (1879).

The stockholder, suing as such, need not make demand nor plead it. See

*Sage vs. Culver*, 147 N. Y., 241.

"The tendency of the discussion and judgments of the court of chancery in Great Britain and of the courts of this country is to concede the existence of a distinct and positive right of property in the individuals composing the corporation, in its capital and business, which is subject in the main to the manage-

ment and control of the corporation itself; but that causes may arise where the incorporators may assert not only their own right, but the rights of the corporate body."

See opinion of Mr. Justice Campbell (1855), in *Bacon vs. Robertson*, 18 How. (59 U. S.), 480, 486.

The rule is now settled in New York, that where it is alleged in the complaint that the corporation remains under the paramount influence of the very directors against whom the action is directed, non-assenting stockholders have standing in equity, to sue in their own names, without demand, making the corporation a party defendant.

*Nash vs. Hall, etc.*, 11 Misc. Rep. (N. Y.), 468; affirmed, 90 Hun., 354;

*Cook on Corporations* (4th Ed.), p. 741.

**Stock newly bought, and for ulterior object, carries right to sue.** — The fact that the stock was purchased just prior to commencement of suit, or that ulterior ends are promoted by the litigation, will not be considered adversely by a court of equity, providing that a wrong exists which the court has power to redress. *Ramsey vs. Gould*, 57 Barbour (N. Y.), 398.

**Equity protects small holder.** — Minority rights will be protected, even where those in control own substantially all of the stock.

*Buffalo Loan Trust and Safe Deposit Co. vs Medina Gas, etc., Co.*, 162 N. Y., 67;

Saranac and Lake P. R. R. Co. vs. Arnold, 167 N. Y., 368.

"There is no reason why, if wrong has been done, or is likely to be done, the holder of one share should not be as fully protected in his rights as the largest holder."

Nash vs. Hall, etc. (11 Misc. [N. Y.], 468), *supra*.

"An owner of one share is to be protected by a Court of Justice, equally with the owner of a thousand shares."

Cook on Corporations, 4th Ed., par. 735.

**Reaches abuse of joint control.** — Where two corporations under the same control are conducted by the control in such a manner as to sacrifice the interests of one corporation in order to advance those of the other, a minority stockholder of the corporation damaged is entitled to equitable relief against the situation.

Jacobus vs. Amer. Mineral Water Machine Co., 38 Misc. (N. Y.), 371; 77 N. Y. Supp., 898 (1902).

See extract from decision in the foregoing case, *supra*.

"It needs no refinement of the decisions to show that the cause thus presented is one for equitable cognizance. Within all of the authorities, a court of equity in the proper jurisdiction should intervene under such circumstances for the protection of the stockholders and creditors, both by injunction and by the appointment of a receiver to represent the com-

pany, since the directors by thus grossly abusing their trust have become disqualified to act."

Hallenborg vs. Greene, 66 App. Div., 590 (N. Y., 1901);

opinion by Mr. Justice Laughlin.

"It must not be overlooked that while a shareholder may do likewise (*i. e.*, ordinarily vote his stock in his own interest), still, as pointed out by the learned justice who wrote the opinion (125 N. Y., 98; 25 N. E., 202; 9 L. R. A. 527), 'their (the stockholders') action resulting from such vote must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the stockholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority.' In such cases, says the court, 'it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders.'

"I am of the opinion that the contemplated action of the shareholders is within the rule as stated. No explanation is vouchsafed to the court upon this application for the proposed action in canceling the agreement, whereby two per cent. is guaranteed to the stockholders of the Postal Company of Texas, by the series of subsidiary companies directly or indirectly controlling the Postal Company of Texas, and in like



manner owning nearly all of its stock, with the exception of that owned by the plaintiff and virtually owning and controlling the Erie Company, which is the company liable to pay two per cent. guaranteed,—has a direct and positive interest in the cancelation of the agreement, to wit: the saving of the two per cent. to the owners of the stock, other than that which it controls.

“A point is made by defendant that no fraud is shown, but Judge Peckham clearly states (page 98, 123 N. Y.; page 202, 25 N. E.; 9 L. R. A., 527), what he understands by ‘fraud,’ in the sense that that term is used by him; *i. e.*, action which is oppressive to the minority stockholders. I think the inference from the facts which stand uncontradicted upon this application is that the proposed action of the stockholders would work a fraud upon the plaintiff.

“The recent case of Farmers’ Loan and Trust Co. vs. New York and N. H. Co., 150 N. Y., 410; 44 N.E., 1043; 34 L. A. R., 76; 55 Am. St. Rep., 689; and the cases therein cited in the opinion of Judge Martin, afford ample support to the conclusion I have reached, [*i. e.*, granting prayer of plaintiff for equitable relief].”

McLeary vs. Erie Telegraph and Telephone Co., 76 N. Y., Supp., 712.

The rules of the High Court of Chancery of England in this connection have been adopted by the courts of the United States.

Bates on Federal Equity Procedure, Vol I., sec. 526,  
p. 540.

Citing, 13 How. (U. S.), 563;

Re Debs., 158 U. S., 577;

144 U. S., 550;

2 Dall. (U. S.), 402.

The foregoing text-writer (Bates), when treating of the restrictive power of the tribunal appropriate to such matters, says injunction is "appropriately termed the strong arm of the Court of Equity. Its office is to require a party to do, or to refrain from doing, a particular thing according to the exigency of the occasion, as indicated on the face of the writ."

Bates, *supra*, Vol. I., sec. 3, p. 3.

Principles and authorities generally. — We have shown that there are two kinds of stockholders' actions. Of the first, in which the stockholder sues in his own name and for himself as an individual, it is unnecessary to say anything further, since they are conducted as other actions.

The second kind of action, however, is an entirely different matter, and different rules and conditions prevail. Formerly, the right of the stockholder to sue at all was questioned. It was strongly later contended that in all cases where the stockholder is suing for himself and "others similarly situated" he should make a previous demand that the corporation, *i. e.*, the directors, should begin the proper litigation, and in addition, that the action would not be permitted

until the instituting papers showed that there was (or would be) an injury; that the shareholder deeming himself aggrieved had made such demand; and that the corporation refused to sue.

The right of the stockholder to sue was established, as we have seen above, in England by

*Foss vs. Harbottle*, *supra* (2 Hare, 461),

and in this country by

*Dodge vs. Woolsey*, *supra*, (59 U. S. [18 How.], 331).

Notwithstanding these cases and others like them, the subject of stockholders' actions, down to a comparatively recent date, has been confined within comparatively narrow limits, and the principles and basic ideas involved have in a large measure either been misconceived or misunderstood. However, the leading case in the New York Court of Appeals,

*Brinckerhoff vs. Bostwick* (88 N. Y., 52),

was important, not so much in establishing the rule which had long before existed, but in bringing the principles extending out therefrom into bold relief. Now that the clouds of doubt which formerly obscured the subject have been dispelled, and all the conditions, rules and principles applicable to the situation are fully understood and well established, they may be thus briefly stated, viz.:

A stockholder deeming himself aggrieved by reason of some injury done, or about to be done, to the corporate property may sue for himself and for other co-stockholders "similarly situated," when (a) he shows

to the court the injury accomplished or intended; (b) when he has demanded of the corporation—*i. e.*, the directors,—that they bring the action and they refuse, or (c) when it is shown to the court that any demand upon the corporation or its directors would necessarily, from the surrounding and attending circumstances, be futile and of no avail.

The cases appearing earlier in this chapter recognize the right of one stockholder to sue in his representative capacity, *i. e.*, as one of a class.

In a celebrated English case of recent date it was held that even where the company was as yet not actually formed,—those who had taken upon themselves the character of proposed incorporators were entitled to the protection of the court for the benefit of all persons who had agreed to be and might, therefore, become members of the company, as against the machinations of their *quasi*-directors.

Gluckstein vs. Barnes, Appeals cases, 1900, House of Lords, p. 240.

This case, decided by one of the highest tribunals, shows to what great extent the courts will go in protecting the interests of shareholders suffering injury at the hands of wrong-doing trustees and directors. The same solicitude is present as well, in the courts of the United States and of the individual States, as we have abundantly shown.

Directors are jointly and severally liable for all

wrongful acts to which they are parties or privies, and also for the result of joint neglect.

Parker vs. McKenna, L. R., 10 Chan. App., 96;

General Exchange Bank vs. Horner, L. R., 9 Eq. Cases, 480.

Although it has not been firmly established until a comparatively recent date that a stockholder could, in behalf of himself and "others similarly situated," sue the corporation under the circumstances noted,—*vide*

Brinkerhoff vs. Bostwick (88 N. Y., 52),

and other cases,—yet we find that as far back as 1878, in Indiana, the true idea was brought out, in *his verbis*:

"Held, also that an action would lie on behalf of a stockholder of the L. M. & B. R. Co. without previous demand by him for redress on the directors of said companies and refusal by them, against all said companies, for an injunction, and to declare void said agreement and assignment."

Board of Comm'rs of Tippecanoe County vs. Lafayette, 50 Ind., 85 (syllabus).

Opinion by Biddle, J.

The above case is one of great interest and should be read in its entirety.

Possibly the most important English case regarding the right of the minority shareholders to sue, etc., and one that has been and is constantly cited in the English courts, was *Menier vs. Hooper's Telegraph*



Works, before the lords justices (1874), L. R., 9 Ch., 350. Lord Justice James therein said:

"I am of opinion that the order of the V. C. in this case is quite right. The case made by the bill is very shortly this: The defendants who have a majority of shares in the company have made an arrangement affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. Hooper's company have obtained certain advantages for dealing with something which was the property of the whole company. The real case, therefore, is that it is the minority of the shareholders who say, in effect and in substance, the majority have divided the assets of the company more or less between themselves to the exclusion of the minority. I think it would be a shocking thing to say that that could be done, because, if so, the majority might divide the whole assets of the company and pass a resolution saying that everything must be given to them and that the minority should have nothing to do with it, that is, assuming the case is made out as alleged by the bill. I say that the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of those benefits ascertained for them in the best way the court can do it, and given to them."

Citing, *Foss vs. Harbottle*, 2 Hare, 461, and also,

Gray vs. Lewis, 29 L. T. R. (N. S.), 12; L. R., 8 Ch., 1035,

Atwood vs. Merryweather, L. Rep., 5 Eq., 464, note.

In a comparatively recent case (1901), in the British colony of New South Wales, we find that, undeterred by differences in latitude and longitude, the principles of equity prevail in "the furthestmost isles of the sea."

In

Davis vs. The Commercial Publishing Co., of Sidney, Ltd., State Reports, New South Wales, Vol. I. (1901), p. 37,

Ch. J. in Equity Simpson said:

"Whenever a member of a corporation has, by the constitution of the corporation, or by contract, a special right or interest, such member has the right to sue the corporation for the protection of such individual right or interest, even though all the other members have similar rights and interests."

The syllabus in the above case, which is sustained by the holdings, is:

"So long as the articles of association of a company remain unaltered, a majority cannot take away rights that are vested by the articles in each shareholder.

"A shareholder is entitled to maintain a suit on behalf of himself and other shareholders against the directors of a company, acting in excess of the authority conferred upon them by the articles of association, where such action involves the taking away of an

individual right vested in the shareholder by the articles."

Citing, *Mozley vs. Alston*, 1 Ph., 790;

*Foss vs. Harbottle*, 2 Hare, 461.

In Mr. Justice Simpson's opinion, from which we have just quoted,

*McDougal vs. Gardiner*, 1 Ch. D., 13,

is distinguished, and

*Menier vs. Hooper's Telegraph Works*, L. R., 9 Ch., 350,

followed.

Though the Irish reports are somewhat meager in regard to cases affecting corporations, yet where these have been the subject of litigation it will be found that the same equitable principles prevail.

Among the most important is

*The Atty. Genl. vs. Belfast Corporation* (1885), in the Irish High Court of Chancery and Rolls, 1 Irish Rep., 200.

Lord Chancellor Brady therein quoted from Lord Hardwicke in the case of

*Charitable Association vs. Sutton*, *supra* (2d Atkins, 400):

"\* \* \* I apprehend that there prevails the same distinction at law as in equity. So long as a corporator acts within the scope of his powers, although he does so irregularly, and perhaps mistakenly, he is not responsible unless he was influenced by malice; but if

he do a wrongful act not within his powers—if he exceed them—then I consider he is responsible, just as any private person would be.”

It should be stated that the foregoing case concerned a municipal corporation.

## CHAPTER XXII.

### Amalgamation—Combination—Consolidation —Merger; and herein also of conspiracy.

Definitions of these terms. — Question of conspiracy is involved. — Absorption of going concern requires unanimous consent. — Railroad cases are most numerous decisions in point. — Combinations known as trusts not treated of herein. — Leading authorities considered and cited. — Essentials of amalgamation stated. — Further authorities in support of text.

Definitions of these terms. — The various methods of combining two or more corporations are indicated in the title. While the distinguishment of the exact shades of meaning conveyed by these terms is not essential to this work, yet it may be useful to define them here.

Amalgamation, as applied to the subject of this work, is defined in the Standard Dictionary as "A union of different corporations to form a homogeneous whole or a new body." Combination is in like connection "the union or alliance of persons for the prosecution of a common object"; and it is to be noted that in this definition, under the head of synonym,



there appears the word "conspiracy." Consolidation is defined as a correlative term and means practically the same thing; while merger is the extinguishment by law of some lesser estate by uniting it with a greater.

Combination and consolidation are practically alike,—each of the component parts retaining, at least technically, its own identity.

While "amalgamation" means that component parts become so thoroughly intermingled that the identity of each is lost in the compound whole, the prime idea is the equality of the component parts at the inception; "merger," however, implies that one of two or more component parts has so absorbed the others that the identity of the absorbed is lost in the personality of the absorber. Merger, therefore, suggests greater and lesser component parts,—the idea seeming to be that some one part so incorporates the others that those which are thus annexed become a part of the continuing factor.

To illustrate the foregoing: A corporation acquires the property, etc., of another corporation. In a case where there is "merger" the acquiring corporation still exists. What it has done is to add the merged corporation to, and make it a part of itself; whereas in "amalgamation," in theory at least and according to the signification of words, the two parts thus welded together, become another and different entity, both former identities being lost in the new.

In regard to "combination" and "consolidation," each

of the two or more corporations uniting, retains its identity; but their interests, management, etc., are unified and they henceforth exist as members of a new body. For instance, the union of the United States may be styled a consolidation or combination, but not an amalgamation or merger.

When any of these terms is applied to the union of two or more corporations, the general idea conveyed thereby is that one corporation has absorbed the other.

When such acts have been done in good faith, and for the benefit of all concerned, the courts have ever been ready to countenance and to support the acts; but when the contrary obtains, quite another condition prevails.

**Question of conspiracy is involved.**—Possibly no method of stock-jobbing jugglery has been more successful in mulcting minority stockholders than the absorption of one corporation by another.

Mr. Cook, in his valuable work, thus speaks :

“It is a favorite modern device of defrauding, *i. e.*, the purchase by a corporation of stock of another corporation.”

Cook on Corporations, sec. 648, p. 1262.

And this subject particularly brings up the consideration of conspiracy,—a thing which equity has ever looked upon with horror and revulsion.

Whenever, in the varied course of business it has been found that the interests of any given number of corporations demand a union of their purpose and ef-

forts, and they are combined together equitably, namely, with like effect to every stockholder, it is a transaction which the courts will sanction, approve of and validify. When, however,—as in by far too many cases,—it is the unavowed object and effect to “freeze out” or “squeeze out,” as it is variously termed, the minority stockholders, then it becomes in its legal aspect a combination of evil men for an unlawful purpose, *i. e.*, a conspiracy. In the history of our judicature, with a few painful exceptions, our courts have with stern and inflexible honesty and justice redressed the wrongs of this nature whenever their protection has been duly invoked.

**Absorption of going concern requires unanimous consent.** — The subject has assumed almost all the forms that human ingenuity can devise. It is beyond the scope of this work to give any more than a brief outline of the law as it is applied in such matters, but we are warranted and sustained by precedent in saying that the general rule obtains that in all cases where the corporation is a sound, or as it is commonly styled, a “going” concern, its absorption by another corporation cannot be lawfully consummated against the protest of a single member, unless the right to take such step was existent at the time when the stockholder obtained his interest in the company.

(See the subject of power to alienate corporate property and rights, as set forth in the remaining chapters, particularly Chapters XXII. to XXIV., inclusive.)

**Railroad cases are most numerous decisions in point.**

— The greater number of the decisions in such matters have, until a recent time, been the consolidation of railroads, and various reasons have been brought forward to sustain and fortify such combinations; but because those corporations are *quasi*-public concerns, such cases for the most part are not germane to the purposes of this work. The principal cases that apply will appear later in the chapter.

**Combinations known as trusts not treated of herein.**

— Within the last few years, however, among the purely business corporations, there has been much in vogue the consolidation or combination of their property and interests. The result has been the formation of what are termed “trusts”; and among the usual reasons given to stockholders for such actions have been the control of the market, the fixing of prices and the prevention of hurtful competition. The nearest approach to this topic contained in this work will be found in the next chapter, “Holding Companies.”

It is not the purpose of the author to go at length or even at all into the questions raised by this policy of control; that subject pertains to the writer on political economy rather than to one dealing with the matter in hand. Hence this work does not concern itself therewith to treat of the same, excepting so far as is necessary to show to the injured stockholder how far his rights extend in the premises, and the course required to protect those rights.

**Leading authorities considered and cited.** — In the



State of Connecticut the powers of corporation under merger and consolidation are fully discussed in *Mead vs. N. Y. H. & N. R. R. Co.*, 45 Conn., 222; and in *Whittlesey vs. H. P. & F. R. R. Co.*, 23 Conn., 431.

In a decision much cited in the British Courts of Equity Vice-Chancellor Sir W. Page-Wood said:

“\* \* \* But there is nothing to make the court hold that the liquidators can compel any person to become bound by any of the obligations attaching on the holders of such shares. Everyone is bound by any contract he may enter into, and if any shareholder actually accepts the shares so offered him by the liquidators he therefore becomes bound as a member of the new company, and further, unless he dissents within the time and in the manner specified by the Acts of Parliament, he is so far bound that he can get nothing else for his own shares except these new shares, whether he likes them or not. He may have lost all his rights over his own shares by his delay, but he may, nevertheless, decline to take this consideration for his shares if he thinks that the consideration would prove burdensome rather than beneficial. \* \* \*”

*Bank of Hindustan vs. China, etc. (Higg's Case)*, 2 Hemming and Miller's Rep., 666.

“A majority of the stockholders cannot by a reorganization bind the minority so as to continue their property in the new corporate venture.”

*Thompson on Corporations*, Vol. I., sec. 272.

In *Clearwater vs. Meredith et al.*, 1st Wallace 68



(U. S.), p. 25, the opinion by Mr. Justice David Davis states the governing principle:

“When any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character at the will and pleasure of a majority of the stockholders so that new responsibilities, and, it may be, new hazard are added to the original undertaking. He may be very willing to embark in one enterprise and unwilling to engage in another. \* \* \*

“There was no power to force him (a stockholder) to join the new corporation and to receive stock in it, on surrender of his stock in the old company.”

It must not be lost sight of in regard to this subject, and it will accordingly be repeated, that most of the reported cases concerning consolidation, etc., are in litigations arising from the combination of two or more railroad companies, and, therefore, in the determining of questions involving purely private business corporations due regard should be had to the difference between the latter and public or *quasi*-public corporations.

“The contract of consolidation is an act of dissolution in form and substance of the Lebanon Company, and the corporation cannot, in the act of dissolution, dispose of the rights of its members. The act of

dissolution, like the act of the association, is not a corporate act, but an act of the members of the corporation. \* \* \* The act of dissolution works a change in the form of the interest of its members by destroying the stock represented—that is a legal interest in the property—and leaves the members to such a division of this. \* \* \*

Lauman vs. The Lebanon Valley R. R. Co., 30 Penn. St. Rep., 42.

Opinion by Lowrie, C. J.

“Where the legislature gives its consent to the consolidation of existing corporations, the effect is to dissolve the former corporations and at the same instant to create a new corporation, with property, liabilities and stockholders derived from the old, upon such terms and conditions as may be prescribed by the act of consolidation.”

McMahon vs. Morrison, 16 Ind., 172

See also,

McCray vs. The Junction R. R. Co., 9 Ind., 358.

The above case is reported in 79 American decisions, p. 418. The subjoined notes, p. 422, etc., affecting the above subject, are as follows:

Definition of consolidation of corporations.

“In *State vs. Bailey*, ante, page 405, and *Lauman vs. Lebanon Valley R. R. Co.*, 30 Penn. St. 42 (and supra), the term “consolidation,” as applied to corporations in the law of this country, is “a surrender of the old charters by companies, the acceptance thereof by

the legislature, and the formation of a new corporation out of such portions of the old as entered into the new." That the legislature may incorporate a new and distinct corporation out of two or more previously existing corporations, and that its powers and privileges may be designated by the reference to the charters of other companies as well as by special enumeration, see principal case; *Railroad Co. vs. Maine*, 96, U. S. 499; *State vs. Maine Central R. R. Co.*, 66 Me., 500. The effect of consolidation as stated in the principal case works a dissolution of the corporations previously existing, and at the same instant the creation of a new corporation, with property, liabilities and stockholders derived from those then passing out of existence:

"*Miller and Miss. R. R. Co. vs. Lancaster*, 5 Cold., 514; and the principal case is cited to this point in *Clearwater vs. Meredith*, 1 Wallace, 40, etc. (68 U. S.); *Mowrey vs. Indianapolis, etc., R. R. Co.*, 4 Biss. 85; *State vs. Maine C. R. R. Co.*, 66 Maine, 500; *Shields vs. Ohio*, 95 U. S., 324; *Railroad Co. vs. Georgia*, 98 U. S., 363."

The "*Pennsylvania College Cases*" (1871) were important litigations in the U. S. Supreme Court, and are reported in 13 Wallace (80 U. S.), 190. The opinion of the court by Mr. Justice Clifford contains the following:

"Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant under such cir-

cumstances becomes a contract within the protection of that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as executed contracts between the government and the corporators, and the rule is well settled that the legislature cannot repeal, impair or alter such a charter against the consent or without the default of the corporation judicially ascertained and declared. Of course these remarks apply only to acts of incorporation which do not contain any reservations or provisions annexing conditions to the charter modifying and limiting the nature of the contract."

Ibid, p. 212.

The principle that the consolidation of corporations operates to extinguish the old and form a new company is recognized in

Keokuk and W. R. R. Co. vs. Missouri, 152 U. S.,  
301, etc.;

also in

Shields vs. Ohio, 95 U. S., 319, etc.

In *Central R. R., etc., vs. Georgia*, 92 U. S., 665, however, it was held that the question of whether the consolidation of corporations necessarily worked their dissolution and created a new corporation under legislative sanction depends upon the intent of the legislature as manifested in the statute under which the consolidation takes place.

"The Maine Central R. R. Co. was, upon the consolidation of the original companies, a new corporation,

as distinct from them as though it had been created before their existence. \* \* \*

“A new corporation may be as readily created by the union of two or more corporations as by the union of individuals; and its powers and privilege may as well be designated by reference to the charters of other companies as by special enumeration.”

Railroad Co. vs. Maine, etc., R. R. Co., 96 U. S., 499.

Opinion by Field, J.

The recent case of Minnesota vs. Northern Securities, 184 U. S., 199 *et seq.* (1903), does not especially hold in regard to the consolidation or other uniting of corporations, except so far as the same conflicts with the rules governing interstate commerce.

“\* \* \* It was natural, therefore, when old corporations consolidated, that the law should treat the new corporation which it then called into being as it would have treated another corporation coming into being at the same time, but starting fresh instead of being a consolidation of the old.”

Shaw vs. The City of Covington, 194 U. S., 593 (1904).

The principle that the consolidation of corporations works a dissolution is very ably discussed in Yazoo and Mississippi Valley Ry. Co. vs. Adams, 180 U. S. 1 (1900); the opinion was by Mr. Justice Brown.



"An amalgamation implies such a consolidation as to reduce the companies to a common interest."

Powell vs. No. Mo. R. R. Co., 42 Mo., 67

See also the able opinion of Chancellor Zabriskie in Black vs. Delaware and Raritan Canal Co., 22 N. J.

Eq., pp. 231 to 430 inclusive.

In England the term amalgamation is equivalent to consolidation; and, as defined, exists where companies agree to abandon their respective articles of association and regulations, and to register themselves under new articles as one body.

Thus there is constituted a new company, formed by the coalition of the companies previously existing:

See

In re Bank of Hindustan, etc., *supra*,

2 Hemming and Miller's Reports, 666 (Vol. III., 1864 and 1865):

This definition of the new relation is supported by Clinch vs. Financial Corporation, Law Reports, Chancery Division, Vol. IV., p. 117; in re Empire Assurance Corporation, Law Reps., 4th Equity Cases, 341.

So in Missouri, an amalgamation implies such a consolidation as reduces the companies to a common interest; Powell vs. North Mo. R. R. Co., 42 Mo., 63, *supra*.

In this case it was also held that where several railroad companies were by virtue of the act of union "merged in and constituted one body corporate," under the name of one of them, and all were continued in

existence, it was treated as a consolidation. But where, by the very terms of the statute and deed, the first corporation was extinguished and the second only continued to exist, the case is not one of mere consolidation or amalgamation.

"The power of the legislature to confer authority upon existing companies to consolidate or amalgamate is unquestioned."

Clearwater vs. Meredith, 1 Wall (68 U. S.), 39.

Black vs. Delaware, etc., Canal Co., 22 N. J. Eq., 130, 455.

Clinch vs. Financial Corporation, L. R., 5 Eq., 450.

In fact, without such authority corporations organized separately could not merge and consolidate their interests.

Clearwater vs. Meredith, *supra*.

This authority may be conferred in the original charter or by the provisions of a general or special act of the legislature passed prior to consolidation, and after the organization of the original corporations.

Bishop vs. Brainerd, 28 Conn., 289;

Southall vs. British Mut. L. Ins. Soc. L. R. 11 Eq., 65; or even by the express sanction of an unauthorized agreement to consolidate.

McAuley vs. Columbus, etc., Cent. Ry. Co., 83 Ills., 348;

Mead vs. N. Y., etc., and N. R. R. Co., 45 Conn., 199.

In the absence of authority clearly conferred, the amalgamation of companies is an act beyond the scope

of the powers, not only of the directors, but of the company, any shareholder may restrain such act.

See,

Charlton vs. New Castle, etc., Ry. Co., 5 Jur. N. S., 1906,—a leading case; decision by Vice-Chancellor Sir W. Page Wood.

Blatchford vs. Ross, 5 Abb. Prac., N. S., 434 S. C., 54 Barb., 42.

“A single shareholder may, therefore, apply for and obtain an injunction restraining his company from carrying into effect an agreement with another company to amalgamate their lines where the legislative sanction for such an act has not been obtained.”

(See further cases cited therein.)

McMahon vs. Morrison (16 Indiana, 172), 79 Am. Decisions, 418 (notes).

**Assent of Stockholders.** — The general rule is that the consent of every stockholder is necessary for consolidation; and those who dissent cannot be compelled to assent.

Citing, Ham. Mut. Ins. Co. vs. Hobart, 2 Gray, 543;

Gardner vs. Ham. Ins. Co., 33 N. Y., 421;

Mowery vs. Ind., etc., R. R., 4 Biss, 78;

Blatchford vs. Ross, 5 Abb. Prac., N. S., 441;

Same case, 54 Barb., 43;

Chapman vs. Mo. R. etc., 6 Ohio St., 119;

In re Emp. Ins. Co., L. R., 4 Eq., 341;

Block vs. Del., etc., Canal Co., 24 N. J. Eq., 455.

“In conferring authority to consolidate corpora-

tions, the legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation.

"Such legislation would impair the obligation of contracts and therefore be invalid. Consequently, there is no power to force a stockholder of the old corporation to join the new corporation and to receive stock in it on the surrender of his stock in the old company."

Clearwater vs. Meredith, *supra*.

Gardner vs. Hamilton, *supra*.

See the very apt language, enunciating the same equitable principle, contained in Menier vs. Hooper's Telegraph Works, decided by the House of Lords (1874), L. R., 9 Ch., 350 and cases therein cited.

The foregoing extracts, together with much other useful and interesting information on the subject of the consolidation and amalgamation of corporations, are taken from the notes to the leading case of McMahon vs. Morrison, 16 Ind. Reps., 172, as found in Vol. LXXIX., of "American Decisions," p. 418, etc.

In the leading case of Blatchford vs. Ross, 5 Abbs. Pr., N. S. (N. Y.), 434, *supra*, Mr. Justice Ingraham said:

"They had no authority by such a consolidation to bring the stockholders under the increased liability for the debts of another company, and expose them to 'loss' which might not have existed before, or which

might follow from the introduction of a new company or association, and a surrender to such new company of all the property of the association. Thus, in the case of private corporations the unanimous voice of the stockholders was regarded necessary to change its provisions (*Livingston vs. Lynch*, 4 Johns., Chan. 373); and even an act of the legislature was held insufficient to compel a change of business in a corporation from what was originally contemplated, without the consent of the stockholder."

*Hartford and N. H. R. R. Co. vs. Creswell*, 5 Hill, N. Y., 383.

In the case of *Clinch vs. Financial Corporation*, L. R., 5 Eq., 450, it was held that an agreement for amalgamation with another company was not within the power of the directors, although the articles authorized the directors to amalgamate with any company formed to carry on any business included in the objects of the company, in a case in which an assessment was made upon its stockholders for the purpose of carrying out the amalgamation.

Upon this branch of the case the learned vice-chancellor thought it was clear that the proposed merger of one company in another, without the consent of the stockholders, was, as to those who did not agree, utterly beyond the powers of the executive committee and directors.

In England, a controlling case is

*In re Empire Assur. Corp., ex parte Bagshaw*, Law Reports, Equity cases, Vol. IV., p. 341 (1867).



The ensuing passage is from the decision therein, by Sir W. Page Wood, V. C.:

“\* \* \* It is difficult to say what the word ‘amalgamate’ means. I confess at this moment I have not the least conception of what the full legal effect of the word is. We do not find it in any law dictionary, or expounded by any competent authority. But I am quite sure of this, that the word ‘amalgamate’ cannot mean that the execution of a deed shall make a man a partner in a firm in which he was not a partner before, under conditions of which he is in no way cognizant and which are not the same as those contained in the former deed. It is true that in this instance, partners engaged in a concern for insurance of a particular character, have authorized their directors to amalgamate with another company. It is possible that this authority may go thus far; it may empower the directors, without being called to account for so doing in this court or by any other jurisdiction, to sacrifice or give up (which implies something more) the whole business, and to transfer their assets, if they think fit, to some other company, allowing that company to carry on the business on the best terms they can make with them. In carrying out this, the directors may say: ‘You who do not like this arrangement must simply lose; we have amalgamated one company with the other’ (which seems to be a process of annihilation or extinction rather than anything else) ‘and we have placed all your assets in the hands of another concern.’ But that does not imply that the dissentient sharehold-

ers, besides losing all their assets, are personally bound to take their part and lot in a new concern."

In another English case, *Clinch vs. Financial Corporations*, Law Reports, Chancery Appeals, Vol. IV., p. 117, Lord Chancellor Cairns said:

"The arrangement between the Oriental Commercial Bank and Financial Corporation, which in the papers in this case, and in the argument before us, has been called an amalgamation or combination, was in substance a transfer by the Corporation to the Bank of the business, good-will, connection and property of the former in consideration of 25,000 shares in the latter. \* \* \*

"The plaintiff was, and continued throughout to be, the owner of his shares in the corporation, and of all rights incident to those shares, unless the rights were taken away, or effectively bound by the arrangement for amalgamation, and he was simply asserting and maintaining those rights. Those rights, in my opinion, have not been taken away. \* \* \*"

Lord Chief Justice Sir C. J. Selwyn and Lord Justice Wood concurred in the Lord Chancellor's opinion.

One of the most important cases in the New York courts touching the question of the consolidation of corporations is *People vs. North River Sugar Ref. Co.*, 121 N. Y., 582 (1890).

Mr. Justice Finch delivered the opinion; it is in part as follows:

"It is true, as we are reminded, that the statute con-

fers upon the trustees and directors general authority to manage the stock, property and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which effect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. \* \* \*

Mr. Brice says, "Many important cases relating to *Ultra Vires* have arisen on the amalgamation of corporations." In these cases the rights and liabilities of the parties concerned have, to a great extent, depended upon the principles of novation. These principles in substance are taken from Roman Law.

Brice's *Ultra Vires*, Chap. III., sec. 1, p. 514 (3d Ed., London).

**Essentials of amalgamation stated.** — "The idea commonly attached to the term 'amalgamation' in connection with corporations is very simple, viz.: the absorption of one corporation by another, the former being *ipso facto* destroyed, and its members relieved and deprived, both individually and collectively, from and of all existing liabilities and rights, save such as

have been expressly reserved to them by the constating instruments and the instruments relating to the amalgamation. The term, however, has not in law any definite significance. It is employed loosely to denote various operations, in themselves widely different, which more or less completely work a transfer of corporate affairs from one corporation to another and a merger of the former body in the latter. The ambiguity and loose meaning of the term was commented on at some length by Page-Wood, V. C., in *re Empire Assn. Corporation ex parte Shaw*."

*(Quod vide, supra).*

*Ibid.*

"A perfect amalgamation, or what is intended to be accomplished by such an operation when thoroughly carried out in all its details and as regards all the parties concerned, involves the following processes:

1. "A transfer of the corporate entity, with its franchises, capacities and powers to another corporation.

2. "A transfer of the corporate assets, rights and liabilities, present or contingent, to such other corporations.

3. "A transmutation of the members of the former corporation into members of the latter.

4. "A novation of the right of the creditors of the former corporation, so that the rights and claims

against it are gone, and instead the latter corporation is their debtor."

Ibid, p. 517.

"Though it is only by or in pursuance of statutory authority that the corporate entity of one corporation can be transferred to and vested in another, or that the members of one corporation can be transmitted into and made members of another, and therefore amalgamation, as meaning or including such results, in the absence of such authority, is impossible; nevertheless, the substance of what is desired to be done in such cases can by proper arrangements and proceedings be accomplished indirectly; and it is these operations, with these results, which are now usually meant by the term amalgamation."

Ibid, p. 518.

"\* \* \* Sec. 6, Consolidation. This is an expression used almost indiscriminately with amalgamation in the United States to denote certain operations relative to the union of corporations."

Ibid, p. 535.

Citing, *Lauman vs. Lebanon, etc., R. R. Co., supra*, (30 Penn. St. Rep., 42).

For a full knowledge of the subject as treated by Mr. Brice, see *idem*, pp. 512 to 536, inclusive.

Further authorities in support of text. — In the examination of this subject it should be again noted that questions of consolidation, amalgamation, etc., have generally arisen in litigations which concern



railroads. The same basic principles apply in large measure to all forms of corporate existence, except in cases where the performance of some public duty is the prominent and controlling feature.

Mr. Spelling has this to say on the subject:

"There is amalgamation or consolidation of one corporation with another when, by consent of its members, it effects a complete transfer of all its property interests and franchises and becomes completely merged in it, or in the creation of a new corporate entity by the consolidation of two or more corporations, which thereby abandon their original organizations and franchises, and transfer all their rights and interests to the new. It has sometimes been attempted to define and explain amalgamation and consolidation as a result of distinct proceedings. The result of merger of one corporation into another, however effected, is an amalgamation, and the same term may properly be applied to the result of two or more corporations, consolidating to form a new one. Though the result is generally designated in the United States as a consolidation, and in England as an amalgamation, the union of two or more corporations may be likened to either the welding of two or more malleable substances so as to form a distinct third, or of one into another whereby the latter retains its name and form, notwithstanding it has received an accession to and change of its substance and nature by the merger of the substance welded into it. Vir-

tually and practically the terms 'amalgamation' and 'consolidation' may be applied interchangeably."

Spelling on Private Corporations, Vol. I., 112, etc., sec. 92.

"But it is also well settled that corporations already formed without the existence of such statutory provisions or express agreement at the time of their formation cannot be consolidated without unanimous consent of their members even though the legislature should authorize the consolidation to be made; for it would work a fundamental change in the contracts of membership, without the consent of every member given through the charter or otherwise. An attempt to effect a consolidation by a majority vote is wholly nugatory, and a single dissenting member may, by objecting, prevent the proposed change."

Ibid, sec. 96.

One person may own all the stock of a corporation and still such individual shareholder and the corporation would in law be two separate and distinct persons. See, Waycross Air Line R. R. Co. vs. Offerman, 109 Ga., 827.

And there is no merger arising from the mere fact that the stock in two companies was owned by the same individual.

Ibid, p. 828, opinion of Cobb, J.

See also in support of above,

Exchange Bank vs. Macon Const. Co., 97 Ga., 1.

In the absence of express legislative authority a

corporation has no power to amalgamate or consolidate with another corporation.

Home Friendly Society vs. Tyles, 9 Pa. C. C., 617 (1891); Schuyler, P. J. See

Baltimore and S. R. Co. vs. Musselman, 2 Grant's Cases (Pa.), 347.

also,

Root vs. Ore Creek and H. R. R. Co., 2d Foster, 145 and

Hamilton vs. Clarion, etc., R. Co., 144 Penna., 34.

While corporations cannot consolidate without authority of law, a banking corporation may transfer its depositors' accounts to another bank, and may borrow money from such other banks to pay its deposits, and may pledge its assets as security, etc. Such action on the part of a bank is neither consolidation nor merger.

Overstreet vs. Citizen's Bank (Supreme Court, Oklahoma, 1903), 72 Pacific Reporter, 379. Opinion by Burford, C. J.

A member of a corporation non-assenting to a corporation merger with other corporations is not bound thereby, and is at liberty to seek his redress against the corporation of which he was originally a member. In this instance the combination of three corporations was sought by legislative enactment. The case clearly expounds the rule that no stockholder can be legislated out of his contractual rights.

Gardner vs. Hamilton Mutual Ins. Co., 33d N. Y., 421.

The rights of the non-assenting stockholder are mentioned and supported in

Jacobs vs. Diamond Soda W. M. C. Co., 94 App. Div.,  
366,—

an unanimous decision.

This case cites and approves

People vs. Ballard, 134 N. Y., 269.

An important English case, containing the central idea above expressed, is

Menier vs. Hooper's Telegraph Works, House of  
Lords (1874), L. R., 9 Ch., 350, *supra*.

An important and much-cited case regarding this subject generally is

Boardman, etc., vs. Lake Shore and Mich. Southern  
Ry. Co., 84 N. Y., 159;

also, incidentally, the following case,—

Doncomb *et al.* vs. N. Y. H. & N. R. R. Co., 84 N. Y.,  
190.

Each of the above cases embraces much of value. For the second appeal in the last-mentioned case see 88 N. Y., 1.

Again, the disfavor which the courts have shown in the matter of amalgamation, or combination of corporations against the will and protest of a single stockholder, is found in

Blatchford vs. Ross, 54 Barb. (N. Y. Sup. Ct.), 43,  
*supra*.

The opinion by Mr. Justice Ingraham does not appear to have been disturbed by later decisions; on the

contrary, the principles therein enunciated are repeated and affirmed.

In conclusion, it may be said that many of the definitions display a waste of acumen and disclose "a distinction without a difference." The substance to be gathered from the foregoing chapter is that amalgamation, combination, consolidation and merger are terms which have been, and under the authorities may continue to be, used indiscriminately to designate the uniting of corporate bodies together into one comprehensive entity.



## CHAPTER XXIII.

### Holding Companies.

Object sought to be accomplished by these companies.

— Old and new methods contrasted. — How Holding Company is formed. — Such method not equivalent to individual holding. — Main asset consists of voting power in companies controlled. — Exclusive control invades property rights. — Principle involved within rule of Dartmouth College Case. — Authorities on right to permanently absorb voting power. — Rule as to fiduciary relation repeated. — It is *ultra vires* to surrender corporate functions. — Such surrender is also against public policy. — It amounts only to revocable proxy. — Trusts not treated of herein. — Stockholders entitled to benefit of individual judgment. — Reasonable latitude allowed. — Some reflections on the general theme of this chapter.

Object sought to be accomplished by these companies. — There is a natural desire on the part of the manipulators of stock corporations to get hold of the public's money and to use it to further their schemes,

at the same time avoiding the often resented and ever distasteful liability to be called to account, or to subject their doings to scrutiny; and it need hardly be said that the consummation of this purpose has called forth superior powers of invention and skilfulness in artifice of an equal degree. One result has been the *quasi-commercial* institution known as a Holding Company, — a form of corporative existence of comparatively recent origin.

**Old and new methods contrasted.** — The system followed in former times was the less artistic “inner circle” or “ring” within the board of directors,—a species of corporate conspiracy formed with the design of selling out the property and franchise *in toto* to a new corporation, entirely owned by themselves and their friends. This “old style” system labored under the disadvantage of requiring the acquisition of the entire assets, and to that extent was cumbrous and unwieldy; whereas the “modern method” displays a distinct advance in human ingenuity and fertility of resource. As will be shown later, this new device permits the employment of a large percentage of the capital of others to promote individual ends.

**How holding company is formed.** — The Holding Company is formed by the creation of a distinct and ostensibly independent corporation, to which is transferred more than fifty per cent. of the capital stock of the group corporations that it is sought to control. Under regular and recognized corporate lines of management, the majority elects the directors and through

them the officers of each, and thus the management of all is secured. While the majority of the stock is retained in the treasury of the Holding Company every dissenting stockholder of the companies thus dominated is debarred from sharing in the management or the emoluments of office; he is, in effect, relegated to the position of an observer, even in matters which deeply concern his interests as a stockholder.

**Such method not equivalent to individual holding.** — It may be said that the majority is liable to be sold and therefore the minority holder is no more injured than would be the case if these shares were held by one or more individuals. But in practice, the case is far different. The exigencies of death and the uncertainties of business do disperse private fortunes and bring again into the public markets securities that carry with them the management of business corporations; but when the control has once vested and become an asset in the treasury of a Holding Company it is usually a permanent investment. In substance and effect, the scheme when consummated amounts to the perpetual disenfranchisement of all shareholders excepting only those who are in favor with the Holding Company. It is to this element of permanency that attention is invoked, for in it is contained the germ from which springs the injustice and the oppression. In brief, the device is a clever perversion of legitimate measures to accomplish, by indirection, an illegal act; as without the consent of every shareholder the business which the shares of capital stock represent

could not be transferred *in toto* to the Holding Company.

Cook on Corporations (8th Ed., Chicago, 1903), sec. 669.

**Main asset consists of voting power in companies controlled.** — This separation of the usufruct, or beneficial interest from the thing itself, is the real capital of such Holding Company, which very seldom engages in active production on its own account, but in place thereof utilizes the franchises of the companies thus controlled.

While the purposes for which Holding Companies are formed are not in all instances improper, or unjust to the stockholders of the companies thus absorbed, yet it is certain beyond the domain of doubt that they do furnish opportunities to thwart minority stockholders and debar them from the vested interests they possess under the doctrine of the Dartmouth College case, and from many of the rights and privileges which are theirs and would be enjoyed by them were it not for such Holding Companies. As has been seen (Chapter XVII., "The Fiduciary Relation"), the relationship between the stockholder and his corporation is a contractual one, and upon becoming a member of a private business corporation the stockholder becomes vested with certain rights and privileges which cannot rightfully be taken from him without his consent, except by due process of law, and this the Constitution vouchsafes to him; for so sacred has this principle become

that it has been declared with authority that a vested right is superior to legislative enactment.

**Exclusive control invades property rights.**— Among the various rights which pertain to the relation of stockholder is the right to attend the corporate meetings and vote for directors and other officers, the right to hold office, etc. These rights the courts have declared and adjudged to be “property.”

See Chapter XXIV., “Constitutional Questions.” Also Dartmouth College Case, 4 Wheat., 250; old paging 517; Shepaug Voting Trust, and Warren vs. Pimm, both *post*.

These facts given and true, it must follow that the Holding Company, when it practically deprives a stockholder, against his will, of that “property,” does, in effect, violate the Constitution of the United States and, for that matter, violates the constitution of each of the various States as well. As these Holding Companies are an invention of recent origin, and they have not been, as yet, the subject of extended litigation, the number of reported cases is small; furthermore, for the same reason, the topic is one which does not appear in the pages of the works of the principal text-writers.

**Principle involved within rule of Dartmouth College case.**— The principle involved, however, is clearly within the rule laid down in the famous Dartmouth College case. Therein the court, with great skill, laid bare the structural contract around which the corporation is built and by which it is maintained.



It enunciated the fact, which remains undisturbed, that without a special reservation of power, not even the sovereign State which created or continues its being can disturb the vested rights which have accrued under that compact. And yet, notwithstanding the high authority which that decision derived from the fulness of learning therein embodied, and from the conclusiveness of the careful consideration which the subject then received, and which the lapse of time has rendered more binding upon the mind, the conscience and the conduct of the well-intending,—audacious manipulators have dared to lay impious hands upon this Ark of our liberties.

Lawmakers have sought, through the instrumentality of excessively liberal statutes, to enrich State treasuries, and with that end in view have authorized Holding Companies to do those things which are prohibited to the sovereign people.

To prove our contention that the Holding Company is a modern device intended to “impair the obligation of contracts,” and to nullify the rule as to “due process of law,” it will be necessary for the reader to bear in mind how such companies, in effect, undermine and destroy the “vested rights” which the court was at such pains to define and declare.

No more authoritative statement of these basic truths is anywhere found than is contained in the apt and forceful language of the Dartmouth College case, (4th Wheaton), 517, as will appear in the following extracts:

"This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration of property. It is a contract on the faith of which real and personal estate have been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirits also, unless the fact that the property is vested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are constantly changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution."

Ibid, p. 413.

"Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract must yet be so construed as to exclude it."

Ibid, p. 414.

"The word 'Contract' in its broadest sense would comprehend the political relations between the government and its citizens, etc. \* \* \* Taken in its broadest unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation and render immutable those civil institutions which are established for purposes

of internal government, and which to subserve these purposes ought to vary with varying circumstances. That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous and so repugnant to its general spirit, the term 'Contract' must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the Constitution a course of legislation had prevailed in many, if not all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals by dispensing with a faithful performance of engagements; to correct this mischief, by restraining the power which produced it, the State legislatures were forbidden 'to pass any law impairing the *obligations of contracts*,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself.

Ibid.

"It is reorganized and reorganized in such a manner as to convert a literary institution molded according to the will of the founders, and placed under the control of private literary men into a machine entirely subservient to the will of the government. This may be for the advantage of this college in particular, and may be for the advantage of literature in

general, but it is not according to the will of the donors and is subversive of that contract, on the faith of which their property was given."

Ibid, p. 419.

"If then a grant be a contract, within the meaning of the Constitution of the United States, the next inquiry is, whether the creation of a corporation by charter be such a grant, as includes an obligation of the nature of a contract, which no State legislature can pass laws to impair."

Ibid, pp. 421-422 (old paging 654-5, etc.),  
quoting

Blackstone, 2d Comm., 37 and 484.

"It appears to me, upon the whole, that these authorities prove incontrovertibly that a charter of incorporation is a contract."

Ibid, p. 423.

**Authorities on right to permanently absorb voting power.** — "Changes in the purpose and object of an association, or in the extent of its constituency and membership, \* \* \* are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members."

Susquehanna Broom Co. vs. Dubois, 58 Penn., 185.

See Chapter XII., "Change of Capital Stock,"  
*supra*.

Such further cases as bear upon the matter in hand will be found in the succeeding pages.

Whether or not stockholders may surrender their voting power and irrevocably vest it in others, permanently or for a stated time, depends upon the circumstances of the particular situation.

Clark and Marshall on Private Corporations, Vol. III., p. 2019.

An important case on this subject is  
Havemeyer vs. Havemeyer, 43 N. Y. Superior Court,  
506; affirmed in  
86 Court of Appeals, 618.

In

Shelmerdine vs. Welsh, 20 Phila., 199,  
opinion by Hare, J., it was held:

"In general, the right to vote on stock cannot be separated from the ownership in such a sense that the election franchise shall be in one man and the entire beneficial interest in another. The person who votes must consequently be an owner, but it does not consequently follow he must be the only one."

In Clark and Marshall, *supra*, the rule is laid down and well sustained that the promise to give proxies based on no other consideration than mutual promise is void because contrary to public policy.

*Ibid*, Vol. III., p. 2020;

Citing, The Shepaug Voting Trust case, *post*.

Bostwick vs. Chapman, 60 Conn., 553.

Starbuck vs. Mercantile Trust Co., 2 Smith's Cases,  
1032.

The Shepaug Voting Trust Case was one affecting



a *quasi*-public corporation. Nevertheless, it sustains the doctrine that public policy forbids the separation of the voting power from the true ownership in matters corporate:

“It is found that these contracts are oppressive and injurious to the Shepaug Company and its shareholders, and were entered into by the directors and officers of the Shepaug Company with full knowledge that they were of that character, and would embarrass the company, its shareholders and the trust certificate holders, and injuriously affect their rights and interests in the railroad property. It is further found that if this Ripley contract were carried out it would seriously impair the financial condition of the Shepaug Company and leave its stock of little value, and there are other facts, which I will not here repeat, that should have a controlling influence.

“The Court cannot give its countenance to contracts that are in fact oppressive and injurious to the company and its shareholders—contracts to obtain personal profit and gain to directors and officers, or in which there is a fraudulent appropriation of the funds of the company to its president, or contracts that are inspired by such an agreement as the facts show this trust and syndicate agreement to have been. It is claimed by defendants that the Court should not entertain the plaintiff’s application because it is an application by the stockholders to the court to interfere with reference to the domestic or internal affairs of the corporation, which they say cannot be done except

under very peculiar circumstances and to a very limited extent.

"I feel justified in saying with reference to this claim, that the facts disclose sufficiently peculiar circumstances to warrant the court in entertaining the application of the plaintiffs. In the case to which I am referred by the defendants for the doctrine of the claim,

Hawes vs. Oakland, 104 U. S., 453,

the Court says: 'The exercise of this power (the power of the Court of Equity) in protecting the stockholders against the fraud of the governing body of directors or trustees, and in preventing their exercise in the name of the corporation of powers which are outside of their charter or articles of association, has been frequent, and is most beneficial, and is undisputed.'

"And the court adds that perhaps the best assertion of the rule under discussion is found in the case of

MacDougall vs. Gardner, 1 Ch. Div., 13,

in which substantially the following language is held: 'Nothing connected with internal disputes between shareholders is to be made the subject of a bill by some shareholder on the part of himself and others, unless there be something *ultra vires* on the part of the company, *qua* company, or on the part of a majority of the company, so that they are not fit persons to determine it.

"And the Supreme Court of the United States further suggests in the same case of Hawes vs. Oakland, that the courts of this country, outside of the Federal

Courts, have in numerous instances admitted the right of a stockholder to sue in cases where the corporation is the proper party to bring suit, but they limit this right to cases where the directors are guilty of fraud or a breach of trust, or are proceeding *ultra vires*. And on page 460 of the same case, the Court says: "We understand the doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation is the appropriate plaintiff, there must exist, as a foundation of the suit, some action, or threatened action, of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization, or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party or among themselves or with other stockholders as will result in a serious injury to the corporation or to the interest of the other stockholders, or where the board of directors or a majority of them are acting for their own interests in a manner destructive of the corporation itself or of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. In my opinion the facts in the case we are considering bring it clearly within the rule thus laid down by the United States Court.

Ibid, pp. 577-580.

"In Griffith vs. Jewett, 15 Weekly Law Bulletin (Ohio), 419,

it was held: 'If such demand be not complied with, the party holding the entire beneficial interest in the stock cannot cast the vote thereof, while it may be voted upon by one having no interest in it or in the company; and so it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably vested in others. It seems that such state of affairs would be intolerable, and is not contemplated by the law, the universal policy of which is that the control of stock companies shall be and remain with the owners of the stock. The right to vote is an incident of the ownership of stock, and cannot exist apart from it (see cases cited). The owners of these trust certificates are, in our opinion, the equitable owners of the shares of stock which they represent, and being such, the incidental right to vote upon the stock necessarily pertains to them.

"They may permit the trustees, as holders of the legal title, to vote in their stead if they choose; but when they elect to exercise the power themselves, the law will not permit the trustees to refuse it to them.'

"The propriety and soundness of the doctrine of this case, and the necessity of its application, can have no better or forcible illustration than in the facts and situation of the matter before us.

"The plaintiffs own 10,300 shares of the stock of this Shepaug road, or its equivalent, and, if the contention of the defendants be sound, are shut out for several years from any voice in the election of offi-

cers and in the policy and management of the corporation.

"If I follow the doctrine in the case, as I feel compelled to, the conclusion must be that these plaintiffs, in the absence of any other well-grounded objection, have the right to revoke the voting power in the agreement.

"But it is said that the case of Griffith vs. Jewett differs from this, in that the power in the former case was irrevocable, while in this it is to last for a term of years only, and, being such, is not against the policy of the law.

"It seems to the court that the surrender by a stockholder of his power and right to vote on his stock for the term of five years is contrary to the policy of the law of this state. Were this a power of attorney in formal terms, no claim would be made but that it was not only contrary to the policy of the law of this state, but in direct conflict with our statute, which says that 'no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting, and no such power shall be used at more than one annual meeting of such corporation.' Gen. Stat., par. 1927. This statute tends to disclose what the policy of the law of this state is touching the matter of the surrender by a stockholder of his voting power to someone else. It would seem that it is opposed to such surrender for an indefinite period or for a period of five



years. Evidently it was thought a longer surrender of the voting power would result disastrously in many ways.

"It cannot be denied that as much disaster might follow to the business and the finances of a corporation and the interest of stockholders, where the voting power is yielded up in a five year voting trust, as by a five years' power of attorney.

"The difference between an irrevocable power and a power irrevocable for five years, is a difference in degree and not in principle. A five year voting power, irrevocable for that time, would furnish time enough and opportunity enough to realize all the evils which our one year statute is manifestly intended to grant against.

"It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as someone who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to dividends and perhaps the right to cast the vote directed, willingly or unwillingly, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise.

"This I conceive to be against the policy of the law,

whether the power so to vote be for five years or for all times.

“It is the policy of our law that ownership of stock shall control the property and the management of the corporation and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.

“And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow-stockholder, to so use such power and means as the law and his ownership of stock gives him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow-stockholders; and he cannot be allowed to disburden himself of it in this way. He may shirk it perhaps by refusing to attend stockholders’ meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this

extent, at least, a stockholder stands in a fiduciary relation to his fellow-stockholders. For these reasons I hold that this trust agreement is void as against the policy of the law of this State.

\* \* \* \* \*

"The trust company is one of the parties to the trust agreement, and it holds the legal title to the stock, and as such holder of the legal title it has in this trust agreement surrendered all a voter's power except the mere manual act of casting the selected ballot. It has in this trust agreement in effect surrendered to this committee the power to select the ballot. It has conceded to this committee the power to demand that it shall vote as they direct. What remains then in this trustee of the voting power, beyond being the mere hand, the use of which this committee is given the right to demand for this purpose at any stockholders' meeting.

"It is not the full voting power to all intents and purposes in this committee, and it is not so by delegation. It seems to me that the voting power in this trust agreement falls within the spirit and intent of the prohibition of our statute heretofore referred to, and is terminable by lapses of the time and the use of it already at one annual meeting.

"It is insisted that there is nothing illegal *per se* in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations, and when this is all there is to the scheme; but when underlying

that pooling contract there is between the members of the syndicate, who are directors or a majority of the directors of a corporation, a secret agreement which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves the profit arising from such extension, or from the contracts which they as directors make, elements of unfairness and opportunity for fraudulent and dishonest practices are introduced, which the court cannot too severely condemn. Such a pooling contract or voting trust is in violation of the most elementary principles of law governing the dealings of trustees with trust property and their *cestuis que trust*."

The foregoing opinion has been quoted here *in extenso* because of its earnestness, fairness and lucidity.

It states the law as it existed at the time. Since that day the voting trust for a limited period has been legalized in some, at least, of the States.

That statutory privilege is at best an extension of power which is of doubtful expediency, since it opens the door to the admission of ulterior motives in corporate management.

It should not be overlooked that in dealing with the precise question before him, the able author of this decision detected the presence of fraud,—an element which may or may not exist in other cases of the same general character.

**Rule as to fiduciary relation repeated.** — In the case of

Barnes vs. Brown, 80 N. Y., 535,



the court, in commenting upon the subject of the director's relations to his corporation, said:

"It is true that the plaintiff, while acting as a director of the corporation, held a fiduciary relation to it. He was a trustee of the corporation and was under the same disability which attaches to all trustees in dealing with trust property and in transacting the business pertaining to the trust.

"He could not act as trustee and for himself at the same time, and he would not be permitted to make a profit to himself in his dealings with the corporation. It is against public policy to allow persons occupying fiduciary relations to be placed in such positions as that there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives."

This decision is utilized at this place to show authoritatively the true standard of trusteeship which should prevail in corporate as in other affairs. The subject of the fiduciary relation has been dwelt upon in numerous places in this work, and will not be again discussed here. The foregoing quotation is also useful to indicate the rule which the Holding Company is usually intended to circumvent.

**It is ultra vires to surrender corporate functions. —** The courts will not permit a corporation "to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn, and to give away to an irresponsible board its entire independence and self-control."



People vs. North River Sugar Ref'g Co., 121 N. Y., 582.

In an interesting case it has been held that corporations cannot combine by turning over their property to a committee nominated by said corporations; that such action is *ultra vires*, even when ratified by the directors and shareholders. See,—

Mallony vs. Hanaur Oil Works, 86 Tenn., 598.

The last-named cases concerned purely private business corporations. These cases are particularly useful here because they show that the idea of outside control, which is the basic principle of Holding Companies, has been passed upon adversely by the tribunals of those States. The rule applies, of course, with more reason and more strictness to *quasi*-public corporations, or those owing particular duties to the public.

**Such surrender is also against public policy.** — As stated by Justice Miller in

Thomas vs. West Jersey R. Co., 101 U. S., 71:

“The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which it undertakes, without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the

grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

Where Mr. Justice Miller says such a contract is void as against public policy, he evidently means it is void because it is in conflict with a definite rule of law, viz., that *all* corporations are accountable to the State for non-user or misuser of the franchise granted. To say that *quasi*-public corporations are so accountable is to state only a portion of this well-recognized principle, which constitutes one of the conditions on which the very existence of corporate existence is based.

From these principles, therefore, it would appear to follow that all contracts of a corporation, either private or *quasi*-public, to enter into combinations, whether of partnership, pool, restraint of trade, trust, lease, consolidation, sale or otherwise, the necessary effect of which is to destroy its autonomy in the performance of its duty to the State, are, or ought to be, held to be void and unenforcible; and this is so, although there are holdings to the contrary (erroneously, as we think), in the cases of leases and sales by purely private corporations.

While a contract by a corporation violating this principle alone is not criminal or wrongful, it is *ultra vires* in the true sense, and the State undoubtedly has a technical right to complain. The State, however, does not, and will not, complain of such a transaction unless the contract made, or things done under it, injuriously affect or threaten public interests; then the

State may interfere by *quo warranto* to prevent or enjoin its consummation, either by ousting the corporation of the power usurped or annulling the charter. As Judge Finch, in setting forth the rule as to those cases where the State will interfere of its own initiative, says in

People vs. North River Sugar Ref'g Co., 121 N. Y., 582 (608):

“\* \* \* The State, as prosecutor, must show on the part of the corporation accused some sin against the law of its being which has produced, or intends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare.”

See,

State vs. Standard Oil Co., 49 Ohio St., 137;

State vs. Portland Natural Gas and Oil Co., 153 Ind., 483, s. c. 53 N. E. Rep., 1089.”

**It amounts only to revocable proxy.** — A voluntary agreement among stockholders of a railway company vesting in trustees perpetually the right to vote the stock of all meetings of the corporation is absolutely void, as contrary to public policy, and in violation of act, etc. \* \* \* Even if such an agency were valid, it would amount to nothing more than a proxy to trustees, revocable at will.

Vanderbilt vs. Bennett, 6 Penn., County Court Rep., 193;

opinion by Stowe, P. J. (1849), (syllabus).

The question of voting trusts and proxies has been thus extensively treated in the citation of authorities, for the reason that the Holding Company in effect is the owner of the permanent voting power of the majority stock-interest of each of its servient corporations, and the practical results are the same as if each holder of such controlling shares had executed and delivered such an instrument. As has been shown, a permanent divorce of the ownership from the voting-power would be set aside as illegal by the courts, if the holder were an individual; and it is contrary to the dignity of government and the spirit of the age that the fiction of a separate corporate entity should be permitted to circumvent a principle which the highest tribunals have declared to be salutary and wise.

In brief and at the risk of seeming to reiterate what has been treated of above, it may be said that since the placing of permanent control in the hands of trustees is contrary to law within the principle laid down in cases already cited in this connection and in *Distilling, etc., Co. vs. The People*, 156 Ill., 448, it would seem in reason to be equally prohibited to fix the corporate control in the treasury of a Holding Company.

**Trusts not treated of herein.** — It has been stated in the previous chapter that this work does not treat of the subject of "Trusts;" there is, however, a phase of the case closely connected with the subject, and to a certain extent collateral thereto, which should not be permitted to pass without some attention and remark.

Recently, certain important causes have been before

the courts,—notably, the Northern Securities lease,—in which the powers, rights and duties of Holding Companies have been referred to, though direct and positive rulings in few instances have appeared in the decisions.

It has been a mooted question whether the law ever will prohibit an individual from disposing of his property, and whether a stockholder may waive or surrender all corporate rights while retaining ownership of such shares.

It is now clear that public policy requires that stockholders, as well as other individuals, shall be interdicted from doing acts the tendency of which would be hurtful to the community at large. Among these limitations upon individual action may be named the prohibitions which the law places upon stockholders in regard to surrendering those rights and privileges which it deems inalienable.

**Stockholders entitled to benefit of individual judgment.** — In an important case regarding voting trusts, *Warren vs. Pim* (Chancery, N. J., 1903),

reported in 55 Atlantic Reporter, 66, after an extended citation and discussion of authorities, Mr. Vice-Chancellor Pitney says,—“\* \* \* the creation of the pool with its iron-clad provision and without the knowledge or consent of complainants, gave the defendants as holders of the foreign stock an unfair and unjust advantage, in that it deprived the complainants of the right to appeal to and have the benefit of the individual



judgments of the foreign stockholders upon any and all matters connected with the management of the corporation. \* \* \*

This decision recognizes the rule in its relation both to equity and to public policy, viz.: Courts will not look with favor upon any arrangement wherein and whereby owners of shares in corporate ventures are deprived of their fixed and abiding right to have the present and active advice and aid of their co-owners, in matters pertaining to the corporation's property and interests.

It is true that owners of shares in a corporation, under certain restrictions, may temporarily delegate their voting and advisory rights to other hands and refrain from active participation in its affairs.

But there is a natural limit to this policy of passive behavior. Each shareholder is a fractional owner of the franchise and receives the attendant rights, privileges and benefits coupled with certain *duties* which he will not be permitted to surrender when it would breed injury to his co-stockholder. The wisdom and judgment of the owner of shares is an asset which inures to the benefit of all. To permit this feature of corporate government to be either ignored or surrendered would be against the dictates of equity and public policy. All beyond the limits named is forbidden ground.

See *Warren vs. Pim*, *supra*, and cases cited.

A leading case is

Dickinson vs. Consolidated Traction Co., 114 Fed. Rep., 232 (1902).

It touches the subjects: Power to alienate; power to lease and sue; rights of minority stockholder; the fraud of directors.

**Reasonable latitude allowed.** — Stockholders of a business corporation may, in a case where no considerations of public policy are involved, authorize a transfer of the corporation to a new corporation and receive the stock of the new corporation in payment therefor. If, however, the transfer operates to defraud persons not parties to the agreement of their property without due process of law, it cannot receive the sanction of the court.

Wilson vs. Æolian Co., 64 N. Y., App. Div., 337 (1901),

Unanimous decision; opinion by Woodward, J.

A portion of the stockholders of one corporation have the legal right to organize another corporation, and the corporation has the legal right to sell a part of its property to the new corporation, or to the individual promoter thereof, before its incorporation.

The corporation is separate and distinct from the stockholder.

Goodwin vs. Botcan Lumber Co., 109 La., 1050 (1902); (rehearing denied, 1903,)

Corporations cannot consolidate without authority of law.

A banking corporation may transfer its depositors' accounts to another bank, and may borrow money from such other banks to pay its depositors and may pledge its assets as security, etc., \* \* \* and such action is not a consolidation or merger.

Overstreet vs. Citizen's Bank (Supreme Court, Oklahoma, 1903), 72 Pacific Reporter, 379.

Some reflections on the general theme of this chapter. — Perhaps it is allowable in this connection to recapitulate by showing the actual working of the plan of operation referred to in the title and which is under consideration in this chapter.

As has already been stated, no doubt there are instances where the Holding Company has been conducted along lines advantageous to all the owners of stock, irrespective of amount; but such instances are probably rare, and occur only where the interest of the acquiring party consists in promoting the prosperity of the concern, rather than its demolition or the utilization of its franchise and property to advance an ulterior end. Where the process of absorption of stock-control has been repeatedly exercised, and the Holding Company assumes large proportions and is perhaps dignified with the term of "Trust," some properties will of necessity be thus favored in order to secure results in way of dividends on the investment; but the ability to secure control of a rival in the manner named, and to destroy its business and annihilate the minority, is a power which is inequitable and unjust and which is

liable to be called into play when any unfair advantage is sought.

Besides being a perversion and an oppression, the device referred to violates the axiom that "the whole is equal to the sum of all the parts," since the ownership of a little more than half of the capital stock of one corporation carries with it the permanent management of the entire property of the others. To illustrate our meaning: Let it be assumed that an investor is the owner of one hundred and five thousand dollars of the capital stock of a Holding Company capitalized for two hundred thousand dollars; that such Holding Company has, by purchase of a majority of the stock of each at par, assumed control of three corporations, each possessing a stock-capital of one hundred and twenty-five thousand dollars. It will be found that such share-owner has by his control of the Holding Company obtained the right and power to manage and control property of others aggregating more than two and one-half times the amount of his own investment. In brief, by an outlay of one hundred and five thousand dollars in the stock of a Holding Company, he can dictate the policy of subsidiary corporations representing an investment of three hundred and seventy-five thousand dollars in all.

This paradox, contrary alike to the moral and the business sense, indicates the falsity of the position now occupied by the Holding Company.

The dangerous feature of the Holding Company was presented at considerable length by Attorney-General

Knox in his brief before the United States Supreme Court in the Northern Securities Case.

Mr. Cook, in his valued work on Corporations, *supra*, has stated the rule to be that the whole property of "a going concern" cannot be sold without the consent of every stockholder; and he adds that this principle has become "embedded in the jurisprudence of modern times." Therein he expresses the consensus of opinions of the ablest judges of courts of last resort.

See Kean vs. Johnson, 9 N. J. Eq., 401.

People vs. Ballard, 134 N. Y., 269,

and other cases cited *supra*.

If, then, the entire property cannot be transferred except by unanimous consent, why should the right to control the same be held in such light esteem that it passes with the sale of a bare majority of the shares that represent such ownership, and this to a corporation whose stock-value is founded in large part on the capitalization of such control? The plan above outlined, when it is observed in actual and active operation and its effects are noted, seems to constitute a palpable attempt to accomplish by indirection what would be an *ultra vires* act if performed in the usual course, *i. e.*, by a sale of *all* the property and rights of the servient corporation to the Holding Company.

The grasping spirit of the age and a too general disregard for the rights of the weaker party have permitted customs such as this to expand until at last they have assumed alarming proportions.



The world has grown so familiar with these methods that it now seems to acquiesce in the propriety and the necessity of such acts, however pernicious they may be in their ultimate results; and it has come to pass that the course outlined above is regarded (erroneously, as we think,) as among the inevitable results of the employment of corporate forms in conducting business ventures.

From the moment such subterfuge obtains, the self-perpetuating quality which produces corporate continuity exists only as a means and instrument of oppression; for the minority shareholder this voting franchise is a mockery, a snare, a delusion. It is true that his expressed demands and his vote are formally received and recorded, and that in appearance he has preserved and still exercises his voting franchise; but for all effectual results he is henceforth reduced to a mere cipher,—a negligible quantity,—and his power and his influence are *nil*. This procedure, so arbitrary, so despotic and so entirely opposed to the principles of equity, would appear to be essentially dishonest in thus appropriating the property and rights of others without consideration or any adequate return. It violates the contractual relation, which, as we have seen, exists between the corporation and its members, forever appropriating to those persons who control the Holding (or voting) Company the influence, the emoluments and the possibilities of office that flow from the common venture.

If the facts above stated are correctly outlined, and

the conclusions therefrom are logically deduced, and if the practical results that flow therefrom are such as it has been our endeavor to set forth in the preceding pages, it seems reasonable to assume that such device, *i. e.*, the Holding Company, is a violation of the constitutional provision which governs the contractual relation and guarantees the protection of "due process of law" to and for all.

If, again, and as we believe, there has been indicated a situation where the rights of innocent holders are damnified and no redress is obtainable within the limits of the rigid rules which prevail on the "law" side of the court, then, and in that event, a case is presented where the powers of Equity may and should be invoked. The benign influence of that remedial institution,—at once so elastic in its scope and so effective in applying the cure,—will then make itself felt, and the oppressing party will be restrained, to the end that equal justice in equal measure may be meted out to all.

Whether the Holding Company infringes upon the doctrine contained in the text-books *sub-capite* "The Power of Alienation" and "The Rule Against Perpetuities," is a subject that can only be mentioned *en passant* here.

It opens a field which is both important and inviting, and which will well repay investigation.

With regard to the abuses referred to above, some suggestions as to the nature, etc., of the remedy will be found in the succeeding chapters.

## CHAPTER XXIV.

## Corporations as Affected by Constitutional Provisions.

Certain constitutional provisions particularly concern corporations. — Same enumerated. — Impairment of obligation of contracts. — Contractual relation is settled law. — Reservation of right to amend. — Exercise of reserved power must conform to Federal Constitution. — Every such amendment is necessarily fundamental. — Vested rights as affected by amendment of charter. — Subject of holding companies is likewise concerned herein. — Modern situation akin to ancient problem of mortmain. — Deprivation of property without due process of law. — Termination of corporate independence should require dissolution and division of assets. — Constitutional amendment as construed by courts. — Constitutional provisions and foregoing divisions are contravened by scheme of Holding Company. — Administrative reform which the situation demands.

Certain constitutional provisions particularly concern corporations. — Certain provisions of the United

States Constitution which are also contained in the Constitutions of most of the several States, apply particularly to corporate bodies, governing and protecting them in their relations with individuals or *inter sese* with the same force and to the same extent (so far as their nature permits), as if these creatures of the law were human entities.

**Same enumerated.** — These constitutional provisions may be placed under two heads, viz. :

1. The impairment of the obligation of contracts.
2. The deprivation of property without due process of law.

**Impairment of obligation of contracts.** — In regard to the first of the above divisions, the material words of Section 10 of Article 1 of the United States Constitution are :

“No State shall \* \* \* pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. \* \* \*”

**Contractual relation is settled law.** — In this connection it may be accepted as settled law (as has been repeatedly set forth in this work), that the relation between the shareholder and the corporation is one of contract, and that the shareholder's privilege to vote and to be voted for and to share in the offices of the corporation is a vested right and constitutes property. It was so held in the famous Dartmouth College case

by Chief Justice Marshall and Justice Story, 4th Wheaton, 514, and is now the law of the land.

See that case, quoted at some length in Chapter XXIII, "Holding Companies," *supra*.

**Reservation of right to amend.** — That decision having been based, in part, upon the absence of any reservation of power to repeal, etc., in the charter,—the custom arose of inserting in the Constitution or general laws of the several States a provision that corporations subsequently formed should be subject to legislative amendment as to their chartered rights.

**Exercise of reserved power must conform to Federal Constitution.**—But this requirement, while in terms usually an absolute condition in the grant, is, in fact, subject in its turn to the Federal Constitutional proviso that "the obligation of contracts" shall not be disturbed by legislation which is wanton, wasteful or unnecessary in its essential features.

Thus, it has been held that the reserved power to amend the charter is a right to be exercised by the legislature in a manner consistent with the Constitution for the time being.

Matter of Reciprocity Bank, 22 N. Y., 9.

"The power of repeal extends only to the franchise, and not to property rights acquired under it."

Abbot's Cyclopedic Dig. (N. Y.), Vol. III., 641.

Citing, *People vs. O'Brien*, 45 Hun., 519; affirmed 111 N. Y., 1.



Mr. Justice Gray, in passing on such a reservation, affirms the legislative right to amend a charter, but intimates that such powers may be limited to enacting laws which will "not defeat or substantially impair the object of the grant, or any vested right."

Looker vs. Maynard, 179 U. S., 46 (1900).

Corporations organized under a general law, and those especially chartered, stand in the same position as to right of amendment.

People ex rel. Sturgis vs. Keese, 27 Hun., 483.

The foregoing case was concerning a religious corporation, but sustained the general proposition.

Barnes vs. Arnold, 51 N. Y., Sup., 1109.

Citing, People vs. O'Brien, 101 N. Y., 1; which strongly holds the property-value of franchise rights.

The power to amend leads directly to the consideration of the underlying principles of chartered rights; for, as has been seen, charters granted to private corporations are held to be contracts.

Wilmington R. R. vs. Reid, 13 Wallace (80 U. S.), 264.

See this with numerous cases quoted in Chapter VIII., "Charter," *supra*.

**Every such amendment is necessarily fundamental.**  
— "Every alteration of a contract implies a new contract, and every amendment of a charter, if allowed, grants a new charter."

Spelling on Private Corporations, Vol. 1., sec. 30.

For this and other extracts see Chapter VIII., *supra*.

"Changes in the purpose or object of an association \* \* \* are necessarily fundamental in their character."

Susquehanna Boom Co. vs. Dubois, 58 Penn. St., 185.

This subject is treated of somewhat *in extenso* in Chapters VIII. and IX., "Charter," and Chapter XXIII., "Holding Companies."

**Vested rights as affected by amendment of charter.** — A vested right has been defined by high authority as "an immediate fixed right of present or future enjoyment." Fearne on Contingent Remainders, quoted by Mr. Justice Brown in Pearsall vs. Great Northern R. R., 161 U. S., 673; see Chapter VIII., *supra*.

It requires no argument, therefore, to show that chartered rights occupy a place in this settled and, as it were, crystallized form of property, based upon contractual rights.

Under the doctrine of the Dartmouth College case and the long line of cases upholding and sustaining it, there can be no doubt that these vested interests may not be disturbed except within the constitutional limitation; therefore, it is not beyond a reasonable view of the situation to assert that the doing of these things by indirection, fractures in an equal degree the protective structure built about those interests.

**Subject of Holding Companies** is likewise concerned herein.—The subject of "Holding Companies," Chapter XXIII. hereof, is important and relevant in this connection and reference is had thereto.

The vested rights which the corporation acquires by conforming to the statutory requirements incident to its creation, include the privilege for the individual shareholder to exercise voting power, and to be eligible to occupy official positions in its management; and as has been shown, this is "property."

The Dartmouth College case and its following are final and convincing in their logic and authority on that point.

**Modern situation akin to ancient problem of mortmain.**—As in a remote period of English history, religious corporations sought to retain the institution of mortmain after the abolition thereof by Parliament, and accomplished that purpose through the creation of a fictitious beneficiary; so modern corporate bodies, in a similar situation, have sought to negative the right to vote, etc., on the part of the minority shareholder, by the device of a separate company, which permanently takes over the controlling stock-interests, leaving to its associates only the empty shell of seeming independence. This device is known as the "Holding Company," already referred to.

**Deprivation of property without due process of law.**—Section 1 of the Fourteenth Amendment of the United States Constitution is as follows, in part:

"\* \* \* nor shall any State deprive any person of life, liberty or property, without due process of law. \* \* \*"

It has already been shown that the right of the

shareholder to vote, etc., is "property," and it may be stated as a reasonable definition of "due process" that it is orderly procedure along the lines provided by law.

**Termination of corporate independence should require dissolution and division of assets.**—Every State has supplied a course of procedure whereby a corporation which has ceased to do business may wind up its affairs and divide its assets among the shareholders. This is the only course which is compatible with orderly procedure, and within the rule as to "due process," as contained in the Constitution. Obedience to that rule requires that all acts amounting to the termination of a corporate existence, *i. e.*, the abandonment of its business, the surrender of the voting franchise to another corporation, or the like, should involve the immediate dissolution of the corporation, and this to comply with the true intent and meaning of the words aforesaid.

That the contrary rule is at present in vogue is no answer to this reasonable interpretation of the words of the Constitutional Amendment above quoted.

Such construction of this protective element of the Constitution would at once, *ipso facto*, remove the greater part of the evils enumerated in Chapter XXIII., "Holding Companies," and it is the opinion of the author that the courts will ultimately so hold.

To adopt the contrary view means to endorse and approve of the appropriation of the property rights of the minority, without "due process," or any "process,"



excepting such as in the ordinary course of affairs originates and exists only in the minds of designing persons.

The existing situation is, in that regard, inequitable in the highest degree; it cannot be regarded as within the purview of the Constitution, and eventually it must meet with disapproval on the part of every just and impartial mind.

**Constitutional amendment as construed by courts. —**

Turning to the somewhat narrow limits within which this subject has been passed upon by the Federal and State courts—the term “due process of law” has been defined and interpreted in the courts from time to time, and these definitions show a remarkable continuity of opinion.

That portion of the Fourteenth Amendment guaranteeing “due process of law” means that there can be no deprivation of life, liberty or property without observance of those general rules established in our system of jurisprudence for the security of private rights.

*Hagar vs. Reclamation, etc.*, 111 U. S., 708.

The expression “due process,” etc., refers to that law of the land in each State deriving authority from inherent and reserved powers of the State exerted within the limits of fundamental principles of liberty and justice underlying our civil and political institutions.

*Hurtado vs. People of California*, 110 U. S., 535.

In an earlier decision the court leaves the matter of



a precise definition to be solved by the process of legal evolution. The phrase "due process of law," in the Constitution, remains without precise definition; there is wisdom in ascertaining its meaning, by a gradual process of judicial inclusion and exclusion, as cases presented require.

Davidson vs. New Orleans, 96 U. S., 104.

Cases decided under this provision of the Constitution, and along lines parallel with the subject matter of the present chapter, are not wanting in the reports of the United States Supreme Court decisions and in the reports of some of the States.

Where a semi-criminal complaint contains no charge against any specified person, nor the substance of the facts constituting the alleged offence, and where the right of a jury trial is dependent upon giving a bond to pay costs, such procedure is not according to "due process of law" and the "law of the land," and the initial court acquired no jurisdiction under such a pleading.

Greene vs. Briggs, 1 Curt. (U. S.), 311 (1836).

The foregoing decision cites Lord Coke, 2 Ins.—to the effect that "due process of law," as contained in Magna Charta, confers the right to presentment or indictment and being brought in to answer thereto.

Because neither the State Constitution nor the laws of California relating to the assessment of railroads operating in more than one county provide for notice to the owner, or an opportunity to be heard at any stage of the proceedings, they both conflict with the

constitutional guarantee that no one shall be deprived of his property without "due process of law."

San Mateo County vs. Southern Pacific R. R. Co., 13 Fed. Rep., 722.

A leading case; see very able and exhaustive opinion of Field, J., and note to case.

"Due process of law," as contained in the United States Constitution, requires that a party shall be properly brought into court, and have an opportunity when there, to prove any fact which, according to the Constitution and usages of common law, would be a protection to him or to his property."

People ex rel. Witherby vs. Supervisors of Essex, 70 N. Y., 222 (1877).

"Due process of law" implies notice or an opportunity to be heard, which the statute must provide for; and it is not enough that in the particular case notice was in fact given.

Matter of City of Brooklyn, 87 Hun. (N. Y.), 54.

The legislature cannot take the property of one person and transfer it to another, even for compensation, unless the public interest will be promoted.

Beekman vs. Saratoga and Schenectady R. R. Co., 3 Paige (N. Y.), 45 (Chancery, 1831).

Taylor vs. Porter, 4 Hill (N. Y.), 140 (1843).

A statute authorizing private property of a person to be taken, against his consent, for the private use of another, although compensation is made, violates the provisions of the Constitution that no person shall be

deprived of property without "due process of law"; and the constitutional provision authorizing private property to be taken for public use implies that for any other use it shall not be taken.

Matter of Albany Street, 11 Wend. (N. Y.), 149 (Supreme Court, 1834).

"It (such taking of private property) is in violation of natural right, and if it is not a violation of the letter of the Constitution, it is of its spirit, and cannot be supported."

Ibid.

See cases in various States cited thereunder in 25 Am. Dec., 618 to 622, and note thereto.

In *Hallinger vs. Davis*, 146 U. S., 320, Mr. Justice Shiras said:

" 'Due process of law' is process due according to the law of the land. This process in the States is regulated by the law of the State."

In *Davidson vs. New Orleans*, 96 U. S., 97, an assessment was resisted and brought into that Court by a writ of error, from the Supreme Court of the State of Louisiana. In the opinion of the court, delivered by Mr. Justice Miller, will be found an elaborate discussion of this provision as found in *Magna Charta* and in the Fifth and Fourteenth Amendments to the Constitution of the United States.

The conclusion reached by the court was, that it is not possible to hold that a party has, without due process of law, been deprived of his property when, as

regards the issues affecting it, he has, by the laws of the State, a fair trial in a Court of Justice, according to the mode of proceeding applicable to such a case. Mr. Justice Bradley, while concurring in the judgment and in the general tenor of the reasoning by which it was supported, criticized the language of the Court "as narrowing the scope of inquiry as to what is due process of law, more than it should do."

The general idea contained in the last quoted and in kindred decision seems to be that each and every State having its own way, and according to its own methods of procedure, provided "ways and means" by which suitors may obtain protection from wrongs or redress for the same, "due process of law" means that all of these ways, means and methods shall be open and available to any party seeking the same, to the end that he shall have his "day in court," with a fair judicial investigation of the facts involved in the particular case.

Telegraph Co. vs. Railway Co., 9 Bissell, 9, is conclusive as to that point.

"Due process of law," as applied to judicial proceedings instituted for the purpose of taking private property for public use, means such process as recognizes the right of the owner to just compensation for the property taken.

Phillips vs. Postal Telegraph Co., 130 North Carolina Reports, 513 (1902).

The very able opinion in the above case was by Mr.

Justice Douglass. In conclusion he quotes from *Telegraph Co. vs. Ry. Co.*, 9 Bissell, 9:

"It is true that the purposes of the petitioner (*i. e.*, Telegraph Company) are greatly for the public benefit, that it is an important factor in interstate commerce, one of the agencies,—and a most valuable agent,—in interstate commerce, and that it is of most essential service to the citizen in the time of peace and to the Government in time of war.

"But the underlying proposition in our civilization and in Anglo-Saxon liberty is the protection of the citizen in the safety of his person and in the undisturbed enjoyment of his property, and when he is called upon to surrender that property against his will for a public purpose, he is entitled to all the safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain."

The essential elements of due process of law are notice and opportunity to defend, and in determining whether such rights are denied the Court is governed by the substance of things and not by mere form.

*Simon vs. Craft*, 182 U. S., 427.

An important case is *Meffert vs. State Board*, 72 Pacific Reporter, 247.

The opinion by Mr. Justice Greene is sustained by many citations.

A case which is not only cited, but quoted quite extensively is *State vs. Board of Examiners*, 34 Minnesota, 387.



Among the extracts thus approvingly employed we note the following:

"Due process of law, or the law of the land, which means the same thing, is not necessarily legal proceedings."

\* \* \* \* \*

"When it is declared that a person shall not be deprived of his property without 'due process of law,' it means such an exercise of the powers of Government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs."

To proceed further in proof of the position that corporate rights cannot be alienated except by consent, or for a public purpose and for just compensation after notice, seems to be an act of supererogation. Accordingly, the reader is referred to the contents of the preceding chapter, where that phase of the subject is entered upon quite fully.

Constitutional provisions and foregoing decisions are contravened by scheme of Holding Company.—If the foregoing decisions are correct in their interpretation and exposition of the theory of our law, as embedded in the Constitution itself, under what authority is it possible to condone acts of the majority in transferring permanently to another corporate body, *i. e.*, to a "Holding Company" the control of the voting power which belongs *pro tanto* equally to every owner, and as has been shown abundantly, is his vested right?

Such action appears to savor of confiscation under and within the forms of law, and doubtless—as already stated herein—will be dealt with accordingly by Equity, at such time as the question shall be presented to the conscience of the Court.

While the decisions contained in this chapter have, of course, a general application, and will be useful in that connection, they seem especially apposite when considered in their relation to the subject matter of the last preceding chapter, "Holding Companies," and accordingly the attention of the reader is again directed thereto, notwithstanding some apparent duplication.

That subject being of comparatively recent origin and no attention having been accorded thereto in any of the valued works of learned text-writers, and none appearing in any of the adjudicated cases, the author has been compelled to travel afield for authorities analogous to those which, no doubt, exist even now in an embryonic state.

Accordingly, the subject possesses interest in double measure: first, from its novelty; and second, from the intrinsic importance thereof to every owner of a share of corporate stock.

The spirit of spoliation, which is exemplified in the "Holding Company" of to-day, marks a distinct element of retrogression and decadence. It is impossible to register too strongly in terms the reprobation and opposition which all well-intending persons should feel therefor.

**Administrative reform which the situation demands.**

— The position outlined in this and the preceding chapters,—which, as will have been noted by the reader, are permeated throughout by one central and connecting idea,—is one which has been deliberately assumed. It is as confidently believed that time will justify such position.

Regarding the form of the relief against the situation, it is probable that it will appear either by way of legislation confirmatory of these constitutional provisions and carrying into effect their intent by specific delimitation of the right of the majority to convey to and vest in a "Holding Company" the corporate control; or that courts of equity will exercise their inherent powers in the premises, and cure this species of injustice by restrictive decisions aimed at the evil alluded to above. Certainly, relief will appear in one or the other of those forms, and it may be remarked that it does not particularly concern the public by which road it arrives, so long as the cure is speedy and permanent.

There will arise contemporaneously with this change in the theory of control, a wider and more abiding confidence in the desirability of shares of stock as an investment for persons of small or moderate means, and such change in turn will yield financial benefits to the corporations concerned. The benefits referred to consist in the increased volume of capital that thenceforth will flow into their treasuries, thereby enabling such companies to undertake larger or more numerous ven-

tures; and it is readily to be seen that this confidence bred of conservatism will lead in the end to the financing of many enterprises of merit, and thereby prove itself of great advantage to the community at large.

Having now reached the place in our work where we have taken up and considered in their order those vital questions which are bound to arise in the course of conducting business under corporate forms, we recognize that we are approaching the close of our labors.

Those general remarks which the subject seems to lead up to and require must, however, be deferred for the moment, and we will ask the further indulgence of the reader while we present in a separate chapter, as concisely as may be, the theory underlying the act of dissolution of the corporation and the resultant termination of the relations borne thereto by stockholders and others.

Such mention is contained in the ensuing chapter.

## CHAPTER XXV.

## Termination of Corporate Existence.

Corporative existence ceases by limitation or by judicial dissolution. — Grounds for termination. — Death of all its members no longer valid ground. — Authorities on subject generally. — Local rules and procedure prevail. — Remarks on subject of chapter.

Corporative existence ceases by limitation or by judicial dissolution. — Chief Justice Marshall, in *Head & Armory vs. The Providence Ins. Co.*, 2d Cranch (6 U. S.), 150, etc., said:

“A corporation can act only in the manner prescribed by the act of incorporation.”

To this may be added what Mr. Judge Vann said in *People vs. Ballard*, 134 N. Y., 269:

“A corporation cannot cease to exist of its own will; its life continues until either the charter period has expired, or the court has decreed a dissolution.”

The foregoing case is important and is worthy of careful study.

Grounds for termination. — But before further ex-



amination of the subject, it may be well to note the various grounds on which these two forms of cessation, *i. e.*, expiration of charter or loss of franchise can take place.

These causes are as follows:

*First.*—The expiration of the period limited in the charter. This occurs, not from the act of anyone, but merely from the effluxion of time. Although it is to be remembered that the corporation is dissolved by the lapse of the time specified in its charter, still, for the purpose of closing out its business, selling its property, paying its debts and dividing the surplus, it still exists in the eye of the law, *pro tempore*. A corporation which, in this manner, has ceased to exist is said to have expired by limitation; all the other forms of cessation fall under the second head, *i. e.*, loss of franchise.

*Second.*—The failure on the part of the corporators to perform, within a reasonable time, any acts which are necessary prerequisites to the full and complete exercise of its corporate powers.

*Third.*—The surrender of the franchise to its creator, with the consent of its stockholders. The creator, *i. e.*, the State, is not, however, bound to accept such surrender.

*Fourth.*—By judgment and decree of a court of competent jurisdiction.

*Fifth.*—Compliance with the statutory regulations as to dissolution and distribution of assets prevailing in the several States.

*Sixth.*—By consolidation, merger, etc., in any of the ways indicated in Chapter XXII, "Amalgamation," etc. A useful suggestion for future statutory regulation will be found in the provision as to compulsory compensation for minority share-owners, contained in the New York Insurance Law, sec. 179 (Laws of 1892, Chap. 690, sec. 179, as enlarged by Laws of 1901, Chap. 677).

**Death of all its members no longer valid ground.**—Some of the earlier writers have named, as a cause for dissolution, the death of all its members; but with the "Private Business Corporation," as now constituted, the deceased stockholders' interest, including the voting power, passes immediately to the legal representatives of the deceased, so that no hiatus occurs.

**Authorities on subject generally.**—In Georgia it was held that the bankruptcy of a corporation did not put an end to its existence nor vacate the office of the directors.

"The bankruptcy of a corporation does not put an end to the corporate existence, nor vacate the office of the directors. A corporation of this State cannot be dissolved by an act of congress, or by the administration thereof, through the Federal Courts. Georgia created, and she alone can destroy."

Holland vs. Heyman, 60 Georgia Sup. Court Rep.,

174;

opinion by Judge Bleckley.

"A corporation must be governed by the law which creates it and by those legislative enactments which in terms apply to it."

Ryan vs. Vallandingham, 7 Indiana, 416 (syllabus).

"If (said) corporation shall fail to go into operation, or shall abuse or misuse their privilege under their charter, it shall be in the power of the legislative assembly to annul, vacate and make void the charter."

The Miners Bank of Dubuque vs United States, 1 Greene (Iowa), 553.

It has been judicially determined as well-established doctrine that a corporation once created cannot cease to exist by non-use or misuse; but must end its existence either by the limitation of time or by judicial termination.

State ex rel. City of Spartanburg vs. The Spartanburg, Clifton, etc., Ry. Co., 51 South Carolina Rep., 129 (1897).

In the above the learned Mr. Justice Jones said, quoting

Morawetz on Corporations, Vol. II., p. 1006,—

"A distinction must, however, be observed between modes limiting the existence of a corporation until the happening of a prescribed event and the provision making the happening of the event a cause for declaring a forfeiture of the charter as upon condition subsequent.

"In the former case, the charter will expire of its own self by its own limitation, but, in the latter case,

a judicial determination of the ground of forfeiture is required before the corporation becomes dissolved."

A manufacturing corporation may discontinue its operation when unprofitable, for the purposes of protecting its shareholders from further loss.

Skinner vs. Smith, 134 N. Y., 240.

After dissolution of a corporation a shareholder may not transfer his share, for the contract of membership is at an end and novation is not possible.

See, Morawetz on Corporations, Vol. I., sec. 168.

**Local rules and procedure prevail.** — In the several States the rules and procedure governing the termination of corporations have been established by statute; but the particulars in such matters cannot be touched upon here; reference to the local laws which control will be necessary in every instance.

**Remarks on subject of chapter.** — Within the brief confines of this chapter there have been set forth at sufficient length for our purpose those methods of termination which alone have been recognized as constituting "due process of law."

It is to this simple and orderly manner of ending the existence and distributing the assets that reference has been repeatedly made herein; it is this procedure which has been advocated and preferred in conformity with the dictates of equity and fair dealing; and it is the annexation of one corporation to another in avoidance of such dissolution, and the continuation of that dependent state after the distinctive career of such corpo-

ration has ended, to which objection with equal frequency has been raised.

With these remarks touching the particular subject wherein the matter contained in this chapter has an especial significance and bearing, we now leave the region of citations and research to a later explorer, and turn to such reflections on the general theme as will occupy our remaining pages.



## CHAPTER XXVI.

## In Conclusion.

Underlying principle of Anglo-Saxon jurisprudence. — Oppression by directors, etc., violates that principle. — Application not remote. — Right to participate is concerned therein. — A solid and firm right. — This right permeates the corporation, extending to every share. — It pertains to and follows the stock. — Reason for this right. — Majority-control no answer to claim of right to participate. — Limitations of powers of directors as representatives of majority-interest. — Allusion to constitutional prohibition against the taking of private property, etc. — This constitutional provision applied to oppressive acts of directors. — Occasion for these remarks. — National well-being requires that the foregoing principle shall be firmly enforced. — Means of redress exists.

Underlying principle of Anglo-Saxon jurisprudence. — There is imbedded in English and American institutions a spirit which has steadfastly opposed every species of fraud, oppression and injustice; and it is one result of this proper sentiment that the rightful

owner can not be deprived of his property, even by the sovereign State, except by "due process of law."

**Oppression by directors, etc., violates that principle.** — Oppressive acts by directors or majority stockholders, such as have been referred to herein, are in contravention of this spirit, which is the embodiment of plain dealing and "fair play."

**Application not remote.** — Nor is the application of this natural sentiment so remote as at first sight appears. Those who contribute of their substance either in money or property in the formation and equipment of business corporations, part, indeed, with the technical title and ownership of their property; but they still retain an interest in its earnings during the life of the institution, and in the distribution of its assets when from any cause it ceases to exist.

**Right to participate is concerned therein.** — In addition to the above, and quite as important, is the right to participate in the management, through and by the means of corporate meetings; to assist in the election of officers, and to themselves hold offices,—privileges, as has been shown, which are declared by the highest courts to possess intrinsic value and to be of the class of "vested rights," within the meaning and protection of both State and Federal Constitutions.

**A solid and firm right.** — This ownership is as solid and as firm as any right can be, and the directors or majority stockholders who deprive their co-stockhold-

ers of any of the above-mentioned rights and interests transgress that constitutional principle, and Equity will compel them to make amends for such act.

**This right permeates the corporation, extending to every share.** — The technical title to the corporate property being in the corporation itself, every injury imports into the corporate body the right to demand redress. Such right permeates, so to speak, every vein and artery; it adheres and belongs to each share; and because each and every individual share represents an integral part of the corporate body, the shares of the guilty majority are affected equally with those of the minority.

**It pertains to and follows the stock.** — It may well be that the wrong-doers are estopped from asserting such rights in a court of equity, because they lack the prerequisite of "clean hands"; but the right accrues to the shares of stock and not to the individual; and such holdings, when transferred to innocent owners, carry with them the ability to apply to equity for redress, even when the original holder,—the wrong-doer,—is shut out.

However much the principle just stated may conflict with the general opinion (and here Morawetz and Cook stand opposed to one another), it is, nevertheless, the logical deduction which flows from the application of established rules.

To recapitulate, shares purchased in the open market may be used as the basis for a stockholder's action,

even though it transpires that such shares were, at the time of the perpetration of the wrong, the property of a tort-feasor.

**Reason for this right.** — And the right exists because the wrong, in the legal aspect, was against the corporate body. To it has accrued the right to redress, and into its treasury must be paid the proceeds, in reparation for the injury thereby sustained.

**Majority-control no answer to claim of right to participate.** — It may, perhaps, be said in answer that where one contributes his money or property as a shareholder in a corporation, he does so well knowing that the majority of the stockholders will appoint a directorate, and that to them and to their judgment and discretion will be confided all the business and affairs of said corporation, for the law imputes to him such knowledge.

This is not denied, but rather affirmed; at the same time, however, it is to be remembered that there exist certain principles which the contributing or purchasing stockholder has an assured right to believe in and to rely and act upon, viz. :

That the directors being trustees, *quasi*-trustees, or, at the very least, occupying a fiduciary position toward him, will live within, according, and up to the rules governing such relationship.

It is not claimed that such directorate is to be hampered or embarrassed by the varied caprices, whims or

notions of one or more dissident stockholders,—that is not it; but the directorate must act properly, honestly and *infra vires*, and must not transgress the rules appropriate to and governing the situation.

The minority stockholder, as has been well established, and is heretofore noted, is not called upon nor required to examine into or watch the acts of directors; he has a fixed legal right to assume and believe that such directors will act as they ought, and not otherwise.

**Limitations of powers of directors as representatives of majority-interest.** — The director-trustee, while he has unrestrained powers within the limitations imposed by deed and law, must see to it that he acts as he should, and if he is discovered as being about to act in contravention to such rules as should govern him, a court of equity, on proof, will restrain him; or if he has accomplished any wrongful and improper thing the same court must hold him liable to the corporation, at the instance of a complaining stockholder.

In fine, when he (the director) steps over and beyond the province laid down as his, or acts improperly, he does so at his peril; and if in so doing he injures the corporate body whose trustee he is, he will be made to refund or make reparation.

**Allusion to constitutional prohibition against the taking of private property, etc.** — Allusion has already been made to the constitutional requirement that private property shall not be taken for public use without



adequate compensation. If, then, private property may not be thus appropriated even for the public welfare, how much more antagonistic is it to the spirit of such Constitution to say that because of a charter, or power, or set of powers and privileges granted by the people through its representatives, certain individuals to whom the exercise of those powers have been intrusted, may, with impunity, take a citizen's property or property rights, without compensation, and retain it to their own use and that of their *confrères*.

**This constitutional provision applied to oppressive acts of directors.** — It is insisted that when a director, by indirection, and by cover of his office, diverts into his own possession or to his own use or to that of his friends or privies, the property or property rights of any person in the corporate assets without that person's consent, and proper compensation, such director, by such act, has violated the Constitution in spirit if not in terms, and that there exists no case where courts are called upon more properly and more urgently to decree reparation, both as compensation for wrong done and to prevent future acts of robbery and spoliation.

The laws are for the weak as well as for the strong. They are, in fact, most requisite for the otherwise defenseless party.

**Occasion for these remarks.** — The facts have made these remarks applicable because comparatively few

of the lesser stockholders have had the courage to press home and demand their rights in the courts, and to call its beneficent powers to their aid.

**National well-being requires that the foregoing principles shall be firmly enforced.** — Public policy and the financial prosperity of the nation require that the courts shall firmly and strictly apply the rules of law and equity which hold directors and the controlling interests they represent accountable, not for errors in judgment, not for failure of business enterprises and schemes undertaken in good faith and for an honest purpose, but for the wrongful and wilful diversion of corporate property and funds into their own pockets, or those of their friends, by any means, in any way or for any reason, however specious it may be, or under whatever subterfuge sought or advanced by such directors.

The wrong is unquestioned and unquestionable, and in the language of Lord Hardwicke, “\* \* \* there can be no injury but there must be a remedy. \* \* \*”

**Means of redress exists.** — It is earnestly submitted that the road to redress exists, and that it is indicated in the foregoing pages.

**FINIS.**





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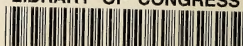
“ ULTRA VIRES.





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